Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

—v.—

BERNARD LITMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of *Erie R. Co. v. Tompkins* prohibits a federal court of appeals in a diversity action from extending to a plaintiff a right to a new trial on punitive damages when such a remedy is not available under controlling state law.

2. Whether a federal court of appeals, by relying on a "risk of appeal" theory, may elevate its desire to secure the obedience of federal district courts to its mandate above the paramount interests of state sovereignty, the *Erie* doctrine, the finality of appeals, the ability of district courts to manage their own dockets, and principles of fundamental fairness and a just result.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are the Petitioner, Massachusetts Mutual Life Insurance Company, and the Respondent, Bernard Litman.*

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* Pursuant to Rule 28.1 of the Rules of this Court, the following is a list naming all subsidiaries (except wholly owned subsidiaries), of Massachusetts Mutual Life Insurance Company:

MML Series Investment Fund
Mass Mutual Liquid Assets Trusts

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OPINIONS OF THE COURTS BELOW

The first panel opinion of the United States Court of Appeals for the Eleventh Circuit ("Litman I"), appears at 739 F.2d 1549 (11th Cir. 1984), and is reproduced as Appendix A. (The Mandate on Litman I is reproduced as Appendix E). After remand and further action, the trial court entered a final judgment and issued an opinion in 1986 which is reproduced as Appendix B, which was appealed and affirmed by a second panel of the United States Court of Appeals for the Eleventh Circuit ("Litman II"). The opinion appears at 791 F.2d 855 (11th Cir. 1986), and is reproduced as Appendix C. Upon motion, an *en banc* rehearing of the United States Court of Appeals for the Eleventh Circuit took place, resulting in a reversal of the second panel; that opinion appears at 825 F.2d 1506 (11th Cir. 1987), and is reproduced as Appendix D.

JURISDICTION

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit was entered on August 31, 1987. This petition is filed within 90 days of that date. The court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case, ongoing now for nine years and the subject of two appeals, was brought by Bernard Litman ("Litman"), a Florida citizen, against Massachusetts Mutual Life Insurance Company ("Mass Mutual"), for breach of contract and for slander, arising out of the termination of a general agency relationship. (Appendix D, p. 9a). Litman had been a general insurance agent for Mass Mutual in the Miami, Florida area. (Appendix A, p. 3a). When Litman's performance proved unsatisfactory to Mass Mutual, Litman was asked to resign. When Litman refused to resign, the general agency contract was terminated. (Appendix A, p. 7a). Litman subsequently brought an action against Mass Mutual for breach of an alleged orally modified general agency contract and to recover for allegedly slanderous statements made by Mass Mutual against Litman. (Appendix D, p. 49a). Litman's complaint at trial contained a claim for breach of contract and claims based upon allegedly slanderous statements. (Appendix A, p. 9a).

The case was tried to a jury which rendered a verdict in favor of Litman as to all counts, and a judgment was entered by the district court in the amount of $2,500,234. (Appendix D, p. 50a). The jury verdict included separate compensatory damage awards for the breach of contract claim and for each of the two slander claims. (Appendix D, p. 50a). The verdict also included a combined punitive damage award based on the two separate slander claims.

As compensatory damages, Litman was awarded $2,000,234 for the breach of contract claim, $100,000 for the first slander claim and $150,000 for the second. (Appendix D, p. 50a). The punitive damage award based on the slander claims was undifferentiated; the jury arrived at the punitive damage award in response to a single question on the verdict form: "What amount of punitive damages do you assess against the defendant, Massachusetts Mutual Life Insurance Company for *the* slander?" (Appendix D, p. 50a n.8 (emphasis in original)).

Mass Mutual appealed the jury verdict, and argued, *inter alia*, that the two slander awards should be reversed; that the trial record was insufficient to sustain an award of punitive damages; and alternatively, that the award of punitive damages was excessive. (Appendix A, pp. 16-21a). In Litman I, the Court of Appeals for the Eleventh Circuit held that one of the alleged slander claims was not actionable and reversed the trial court on that ground. (Appendix D, p. 50a). Finding that the punitive damage award was based in part on the one defective slander claim, the panel in Litman I remanded the issue of punitive damages for a new trial. (Appendix A, pp. 20-26a).

On remand, Mass Mutual, in an attempt to put an end to the litigation, waived its right to a new trial on the issue of punitive damages and consented to the entry of a judgment awarding Litman the total amount of the original combined punitive damage award. After considering Litman's objections, the district court entered a final judgment on punitive damages in the amount of the original jury award, plus interest from the date of the original final judgment. (Appendix B, p. 26a).

Litman then appealed (Litman II) on the theory that the Litman I mandate entitled *him*, even though he had not appealed any issues to the court, to a retrial on punitive damages. (Appendix C, p. 50a). A majority of the panel in Litman II found that the district court's entry of a final judgment did not run afoul of the mandate, and that in granting a new trial, the Litman I panel had not intended to

subject Mass Mutual to the possibility of a higher punitive damages award for one slander than had been awarded previously for two. (Appendix C, p. 29a).

The dissenting member of the Litman II panel believed that the district court had violated the mandate by allowing Mass Mutual to waive retrial on punitive damages. (Appendix C, p. 35a). The Litman II dissenter also claimed that the majority opinion in Litman II had for all practical purposes overruled *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985), *cert. denied sub nom. Hoffman v. Sylva*, ____ U.S. ____, 106 S. Ct. 2889 (1986), an earlier Eleventh Circuit opinion regarding the law of the case doctrine, although he did admit, however, that the result was "probably just." (Appendix C, pp. 37-38a).

Upon petition by Litman for rehearing, the court of appeals convened, *en banc*, to consider whether the mandate in Litman I was faithfully followed by the district court. (Appendix D, p. 40a). The *en banc* court consisted of 13 judges. (Appendix D, p. 40a). Only seven judges joined in the opinion of the court; one judge concurred "dubitante;"[1] one judge joined in the judgment only, and four judges dissented. (Appendix D).

The seven judges who joined in the majority opinion found error in entering final judgment based on the original punitive damages award. (Appendix D, p. 57a). These seven judges held that the Litman I mandate had been violated because in remanding the cause for retrial of the punitive damage claim, the intention was to give Litman the right to a new trial on punitive damages, despite the fact that he had filed no appeal in Litman I and was not entitled to appeal under controlling Florida law. (Appendix D, p. 52a).

The seven members joining in the opinion justified this conclusion by stating that Mass Mutual should have calculated the "risks" inherent in an appeal and should have deduced that

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1 A "concurrence dubitante" is a "doubting" concurrence. BLACK'S LAW DICTIONARY 448 (5th ed. 1978). The "[t]erm is affixed to the name of a judge . . . to signify that he doubted the decision rendered." *Id.*

adverse consequences might attach even under circumstances where Mass Mutual was the winning party on appeal. (Appendix D, pp. 55-56a). The majority of the *en banc* court also found that Mass Mutual waived any grounds it had for complaining about the result by failing to move in the court of appeals to set aside or modify the mandate in Litman I. (Appendix D, p. 56a). According to the dissenting judges, these seven judges conceived the action of the district court to be a threat to the institutional authority of appellate courts over lower courts, the "stability and predictability of the law, the law of the case doctrine, and the mandate rule."[2] (Appendix D, p. 45a).

An eighth member of the *en banc* court concurred doubtfully in a separate opinion. (Appendix D, p. 58a). This judge differed as to the reasoning, finding that Mass Mutual, although the successful party on appeal of the punitive damages issue, was "potentially in a worse position than it would have been had it chosen not to appeal at all." (Appendix D, p. 59a). In view of this unfortunate and unexpected outcome, this judge believed that Mass Mutual should have been afforded relief by the court of appeals and should have petitioned the court of appeals rather than the district court for a waiver of "benefits." (Appendix D, p. 59a). He believed as well that procedures should be developed so that future litigants prejudiced by a partially favorable award could petition to waive the relief "gained" on appeal. (Appendix D, p. 59a).

Four judges dissented, finding that the district court's action in entering judgment on the jury award of punitive damages was no affront to the appellate authority of the Litman I court or to the mandate rule. (Appendix D, p. 62a). The dissent believed that Litman had no standing to complain, because the original panel did not grant Litman the "right to a new trial," and that the matter of a new trial on punitive damages was a

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2 Interestingly, the *Piambino* decision, the integrity of which the *en banc* majority seems concerned with preserving, was authored by one of the dissenting judges.

"consequence of the explicit relief the panel *gave Mass Mutual*." (Appendix D, p. 63a) (emphasis added).

While the dissent agreed with the majority that the practice of going before the district court for such relief should not be encouraged, the dissent believed that logic and common sense favored approval of the district court's decision. (Appendix D, p. 62a). As the dissent stated, the "federal judicial system" will not be damaged by "granting a victorious appellant—who has persuaded the appellate court that his adversary's damages award is excessive and has been accorded a new trial—the option of paying the excessive award and terminating the case. . . ." (Appendix D, p. 64a). Indeed, "the option will benefit the system." (Appendix D, p. 64a) (footnote omitted).

The *en banc* court reversed and remanded the judgment of the district court with instructions to the district court to retry the issue of punitive damages. (Appendix D, p. 57a). By order of the Court of Appeals for the Eleventh Circuit the mandate of the *en banc* court has been stayed to and including October 30, 1987, and upon filing of this petition until disposition by this Court.

REASONS FOR GRANTING THE WRIT

The jurisdiction of the federal courts in this case is based on diversity of citizenship. The issue regarding the punitive damage award before the court was interwoven with the rights and obligations of the parties; therefore, the *Erie*[3] doctrine required the federal court of appeals to apply Florida law. *See Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 535 (1958). The decision of the *en banc* court of appeals, however, is at odds with *Erie*. Indeed, the court of appeals has prioritized respect for its mandate above the *Erie* command to respect and preserve Florida law.

Historically, this Court has taken certiorari jurisdiction to correct lower courts when *Erie* principles are involved. *Byrd*, 356 U.S. at 525; *Hanna v. Plumer*, 380 U.S. 460 (1965). Interestingly, this Court has recently issued a writ of certiorari to the Eleventh Circuit to review another case where that court set aside *Erie's* mandate in favor of its view of federal law's preeminence over the forum state's public policy considerations in a diversity case.[4] Never before, however, has this Court considered and cured an *Erie* case evolving from a power struggle between a court of appeals and a federal district court of the magnitude presented here.

The court of appeals has so far departed from the central teachings of *Erie* as to require the intervention of this Court. Accordingly, this Court should issue a writ of certiorari to the court of appeals, end the struggle between it and the federal

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3 *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

4 In *Stewart Organization, Inc. v. Ricoh Corp.*, 810 F. 2d 1066 (11th Cir. 1987), *vacating* 779 F. 2d 643 (1986), the *en banc* Eleventh Circuit reversed a federal district court which refused to enforce a choice of forum clause because it was violative of Alabama state law policy. The *en banc* court held "that forum selection clauses present procedural questions to be resolved by federal law independent of forum state policy." *Id.* at 1067. This Court has issued a writ to review that decision. *Stewart Organization, Inc. v. Ricoh Corp.*, 56 U.S.L.W. 3262 (U.S. *cert. granted*, October 13, 1987).

district court, and require the court of appeals to follow the *Erie* doctrine.

1. The Court of Appeals Erroneously Failed to Follow Controlling State Law

a. *The Purpose of the* Erie *Doctrine*

The *Erie* doctrine is derived from the "realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna*, 380 U.S. at 467. The doctrine also discourages "forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468.

b. *The Controlling State Law*

The law of Florida was clear and controlling below. Under Florida law, punitive damages serve to redress a public wrong. *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 247 (Fla. 1983). Punitive damages are awarded to punish the tortfeasor "and to deter the commission of similar acts in the future." *Id.* (citing *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981); *Wackenhut Corp. v. Canty*, 359 So. 2d 430 (Fla. 1978); *Campbell v. Government Employees Insurance Co.*, 306 So. 2d 525 (Fla. 1974)). A plaintiff in a tort action has no *right* to punitive damages. Accordingly, a plaintiff cannot appeal an award of punitive damages which it deems inadequate, unless the plaintiff can "prove fraud or an improperly influenced jury." *St. Regis*, 428 So. 2d at 247.

c. *The* Erie *Violation*

By ordering a wholesale retrial of punitive damages in this case, the Eleventh Circuit disregarded Florida law and on its own created a federal right unavailable to plaintiffs in Florida state courts.

The question of when punitive damages are available, the proper amount of the punitive damages, and which party may appeal the award of punitive damages, is "bound up with these

rights and obligations" of the parties, and under *Erie* is appropriately left to the states to determine. *Byrd*, 356 U.S. at 535. Each state sets its policy for governing the civil rights and responsibilities of the citizens in that state. W. Prosser and W. Keeton, *Prosser and Keeton on Torts*, 15 (5th ed. 1984); Bohlen, *Fifty Years of Torts*, 50 Harv. L. Rev. 725 (1937).

Tort law, including punitive damages jurisprudence is particularly governed by state policy choices. *Erie*, itself dealt with a tort question and this Court held that the issue "was substantive in every traditional sense. . . ." *See Hanna*, 380 U.S. at 471-72.[5]

Florida has made such a choice, and this policy choice should not have been rejected by the court of appeals. *See St. Regis*, 428 So.2d at 247.

Other states such as Wisconsin have made the same policy choice and do not allow plaintiffs the right to appeal punitive damage awards. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980). In *Ma v. Community Bank*, 686 F.2d 459, 468 (7th Cir. 1982), *appeal dismissed, cert. denied*, 459 U.S. 962 (1982), an *Erie*-bound Seventh Circuit Court of Appeals recognized the primacy of Wisconsin law and refused to allow the plaintiff the right to appeal the punitive damage award. *Id.* at 467-68 (citing *Wangen*, 97 Wis. 2d at 301-07, 294 N.W.2d at 260 [sic]). The Eleventh Circuit's *en banc* holding in Litman II reaches a contrary result.

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5 Moreover, the issue of punitive damages, a quasi-criminal penalty, is wholly a matter within the province of Florida lawmakers, both legislative and judicial. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (Punitive damages "are private fines levied by civil juries to *punish* reprehensible conduct and to *deter* its future occurrance.") (emphasis added). Punitive damages, therefore, have nothing to do with compensation for the alleged injury.

The effect of an intrusion by a federal court upon a state's sovereignty in an area so exclusively its own, sets a dangerous precedent and may be far-reaching indeed. Additionally, the justification for such deep federal intrusion into matters of state policy is lacking, for there is no federal interest extant, save perhaps a limitation on awards which offend constitutional principles.

By deciding in this case that the district court had violated the mandate in Litman I, (rather than simply applying it to a new issue), and by ordering a new trial, the Eleventh Circuit has charted a course outside *Erie*'s boundaries. *Hanna*, 380 U.S. at 471-472. Its opinion, materially altered the result of litigation merely because the suit was brought in federal, rather than state court. *Id.* at 467.

The decision to compel a new trial on punitive damages thus offends the "twin aims" of *Erie*, by encouraging rather than discouraging forum shopping and creating rather than avoiding the "inequitable administration of the laws." *Id.* at 468.

d. *The Eleventh Circuit's Rationale Does Not Survive Scrutiny*

The stated rationale for the *en banc* court of appeals decision was that the district court violated the law of the case by allowing Mass Mutual, the successful party on appeal, to accept the original jury verdict on punitive damages. (Appendix D, p. 55a). Under the reasoning of the Eleventh Circuit, Litman—the unsuccessful party, who took no appeal—somehow obtained a right to roll the dice again in a new trial.

The court of appeals does not explain how Litman, the plaintiff, acquired a right he did not possess under state law, in an action in which he did not appeal.[6] The result, however, is that Mass Mutual, the "victorious" party, must suffer through a retrial on punitive damages, in complete contravention of state law and common sense. The anomaly of this result is not altered by recourse to the doctrine of law of the case.[7]

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6 The Eleventh Circuit interprets its mandate from the first appeal in such a way as to give both Litman and Mass Mutual a right to a new trial, a right which the court of appeals states "belonged to neither party individually but rather to both." (Appendix D at 53a). No support is offered by the court for this proposition.

7 Law of the case is a doctrine of judicial self restraint imposed by higher courts on lower courts to ensure finality and obedience within

The issue before the Eleventh Circuit in Litman II was not a "law of the case" issue at all. The Litman I opinion was clearly designed to grant relief to Mass Mutual because the punitive damage award was grounded in part on a slander claim which had no basis in Florida law. The district court's order following the mandate was a reasonable and logical extension of the result to an issue not previously raised—*i.e.*, whether Mass Mutual could waive its right to a new trial on punitive damages and accept the original punitive damage award, even though that award was based in part on a claim struck down by the appellate court.

Curiously, the court of appeals reacted strongly to this reasonable extension of its decision, viewing it as an affront to its authority. Maybe the court was trying to prevent what it considered to be gamesmanship, lawyers trying to achieve below what could not be achieved above. (Appendix D, p. 55a). The mental machinations of counsel were not part of the record, however, and certainly cannot be presumed to have been ill intended.

Ironically the new result forged by the court of appeals itself fosters gamesmanship. It has turned a rational application of its mandate into the possibility of a jury assessing *more* punitive damages on *one* slander claim than the original jury had assessed based on two claims against the "*winning*" party on appeal.

It does so apparently because it views the violation of the mandate rule to be so egregious as to require such a result.[8] Further, it seeks to justify the result reached on a visceral level by suggesting that Mass Mutual got what it asked for. Hardly.

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the court system. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Southern R. Co. v. Clift*, 260 U.S. 316 (1922); *Messinger v. Anderson*, 225 U.S. 436 (1912).

8 Interestingly, despite the clear variance from controlling state law, the court of appeals makes no reference to the obvious *Erie* implications of its result.

Mass Mutual was granted only a small part of the total relief requested in Litman I, and not even that if the *en banc* decision stands.

If this Court does not issue a writ of certiorari and reverse the appellate court, the medicine given to Mass Mutual and others who find themselves in the same predicament before a federal court, as opposed to a Florida court, may prove to be worse than the malady.

2. The Eleventh Circuit Departed From the Accepted and Usual Course of Judicial Proceedings

The court of appeals, *en banc*, departed from the accepted and usual course of judicial proceedings, mandating this Court's intervention.

Because the court below perceived that its authority had been threatened, it reached for a principle which it thought sufficiently important to sacrifice the correct, "fair" result in the case, and perhaps more importantly, without thought to the future effects of its action. This is apparent from the *en banc* opinion which states:

> *That the result may be fair is not the issue we address.* Mass. Mutual's "waiver" effectively modified the mandate by unilateral action. We hold today that a successful appellant cannot change its mind and take unilateral action in a trial court to modify a mandate of this court. Such post-decision maneuvering undermines the process creating confusion, uncertainty and potential abuse.

(Appendix D, p. 55a (emphasis added) (footnote omitted)).

The majority of the *en banc* court ignored altogether, however, the requirements of forum law. It justified its position under the unique theory that Mass Mutual should have known that by challenging the punitive damage award, the court of appeals could create a right for the plaintiff which he previously did not have and would never have had in a Florida court. It further justified itself by opining that Mass Mutual

should have known somehow to ask the court of appeals rather than the district court to correct or modify the injustice created by its decision, even though it is not apparent that the issue was one properly for the court of appeals at all, much less an issue exclusively reserved to that court. (Appendix D, p. 56a).

a. *The Decision of the Eleventh Circuit Violates Due Process and Requires this Court's Intervention for the Proper Administration of Justice*

The decision of the Eleventh Circuit forcing Mass Mutual to return to the trial court to face a second trial on punitive damages when there is no basis in state law to support such a decision is arbitrary and offends due process. The quasi-criminal nature of punitive damages merits a greater concern for fairness and justice than was observed by the Eleventh Circuit in this case. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (In accordance with "cherished tradition, punishment cannot be imposed without due process of law."); *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The resulting constitutional infirmity cannot be justified by invocation of the mandate rule or the law of the case doctrine.

The Florida Supreme Court has recognized the quasi-criminal nature of punitive damages by granting only the defendant the right to appeal the award of punitive damages, and has thereby established a substantive rule which provides due process rights to defendants appearing in Florida courts. *St. Regis*, 428 So.2d at 243; *See also Arab Termite and Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039, 1042 (Fla. 1982) ("Punitive damages apply to wrongdoing not covered by the criminal law, where the private injuries inflicted partake of public wrongs.").

Even if the Eleventh Circuit had reason to be concerned about the integrity of the mandate rule in this case, the severity of the penalty imposed—a new trial on the punitive damage issue—far exceeds any harm done to the mandate rule.

Surely a court of appeals' interest in the finality of its decisions, the law of the case doctrine, and the hierarchy of the federal courts, does not justify its total disregard for state sovereigny, the dictates of *Erie*, and principles of fundamental fairness. This Court must intervene to restore a proper balance to the interests at odds in this case.

b. *The Eleventh Circuit has Reduced the Appellate Process to a Game of Chance with No Logical Underpinnings*

The "appeal at your own risk" analysis employed by the court below is unsupported by either case authority or sound judicial reasoning. The elevation of such analysis to a general principle of law will engender doubt and uncertainty in appeals brought in the Eleventh Circuit and is likely to have a chilling effect on the commencement of legitimate appeals in that circuit. More importantly, it will at least weaken the vitality of the *Erie* doctrine, if not threaten its very existence.

The specter rises of the appellate process becoming a high stakes game of chance. A party in a diversity case who wishes to exercise his rights to appeal must calculate the unknown odds of the court of appeals failing to comply with a controlling question of state law and granting a form of relief to the opposing party to which the opposing party is not entitled and which it has not requested. No cases were offered by the *en banc* court of appeals to support this reasoning; Mass Mutual has likewise been unable to find any. (Appendix D, p. 57a).

c. *The Court of Appeals Has Eliminated the Finality of Appeals and Interfered With the District Court's Ability to Manage its Docket*

The court of appeals' emasculation of the *Erie* doctrine and its effect on future cases is obvious; the overriding federal interest for doing so is not. The effect of the *en banc* opinion, if allowed to stand, has other far-reaching effects as well. Disappointed parties in future appeals had best understand the importance, in the Eleventh Circuit, of seeking clarification of

a mandate even under circumstances where, as here, the opinion and mandate are clear. Moreover, the appellate court will no doubt have to grant such requests even if it is to say: "We meant what we said." The clarification process will result in additional judicial labor for the appellate court without benefit or rational purpose. The clarification process will in fact encourage the very post-decision maneuvering that the *en banc* court sought to avoid. (Appendix D, p. 55a).

As a result of the *en bānc* opinion, district courts in the Eleventh Circuit will be unable to control and manage their own dockets. In rendering the *en banc* decision, the Eleventh Circuit has created the likelihood that even those issues which were never raised or decided on appeal will be construed as being included within the mandate. This will tie the hands of the lower courts in ways never intended by the law of the case doctrine. The law of the case doctrine has never before been "extend[ed] to issues the appellate court did not address." *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985), *cert. denied sub nom. Hoffman v. Sylva*, ____ U.S. ____, 106 S. Ct. 2889 (1986).

Ironically, this new principle works to keep alive a diversity case, even though the result is radically different from one which could have been reached by a panel of state judges, who are after all responsible for establishing state law.[9]

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9 Diversity actions already comprise "20 percent of the district courts' current caseload and 14 percent of the courts of appeals caseload." R. Posner, *The Federal Courts: Crisis and Reform*, 139 (1985). In recognition of the increased workload of the federal courts, there has recently been "public debate and proposed legislation primarily focused on proposals to curtail or abolish access to federal courts" on the basis of diversity of citizenship, rather than on measures to enlarge it." *Consumers Savings Bank v. Touche Ross & Co.*, 613 F. Supp. 249, 253 (D. Mass. 1985) (citing R. Posner, *supra*, at 139-47). The action of the Eleventh Circuit, therefore, not only represents the wrong legal result, but displays an attitude which is out of step with emerging views of respected scholars and courts alike. The dissenting members of the *en banc* court recognized the error in the majority's reasoning by noting that the actions of the district judge in ending nine years of litigation benefitted the judicial system. (Appendix D, p. 64a).

The court of appeals disturbed what would have been a proper and completely just end to nine years of federal judicial labor in a diversity action, thus breathing life back into a diversity case which had otherwise reached a long-deserved state of repose. Now, unless this Court intervenes, the parties will be back to square one on the issue of punitive damages, with the possibility of several more years of litigation looming on the horizon. This, in a circuit which is already overburdened, manifestly contravenes common sense and principles of judicial economy.

CONCLUSION

This petition for writ of certiorari should be granted and, upon review, the decision of the *en banc* court of appeals should be reversed.

Dated: October 30, 1987.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Aug. 27, 1984

No. 83-5025

BERNARD LITMAN,

Plaintiff-Appellee,

—v.—

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendant-Appellant.

KIMBRELL, HAMANN, JENNINGS, WOMACK, CARLSON & KNISKERN, P.A., CARL K. HOFFMAN, DANIELS & HICKS, MARK HICKS, Miami, Fla., *for defendant-appellant.*

PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A., JOEL D. EATON, Miami, Fla., *for plaintiff-appellee.*

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and ANDERSON, Circuit Judges, and MARKEY*, Chief Judge of the Federal Circuit.

* Honorable Howard T. Markey, Chief Judge, U.S. Court of Appeals for the Federal Circuit, sitting by designation.

FAY, Circuit Judge:

Appellant, Massachusetts Mutual Life Insurance Company (herein Mass Mutual), appeals from a final judgment in favor of one of its former general agents, appellee Bernard Litman, in the amount of $2,500,234. A jury, sitting in the United States District Court for the Southern District of Florida, awarded $2,000,234 for the breach by Mass Mutual of an orally modified general agent's contract in the company's 1977 termination of Litman. The jury awarded $100,000 in damages for a slanderous statement made by a Mass Mutual spokesman to a prospective employer who had solicited information regarding Litman at Litman's request. An additional $150,000 was awarded for slander resulting from statements made by two Mass Mutual employees to Litman's former insurance salesmen as to the reason he was terminated. The jury also awarded $250,000 in punitive damages for slander.

Mass Mutual presents five major issues for review:

(1) Whether there is substantial evidence to support the jury's findings of a valid oral modification to the written general agent's contract and of promissory estoppel; (2) whether a new trial is required on the issues of modification and promissory estoppel; (3) whether the slander award based upon the statement made by a Mass Mutual executive to Litman's prospective employer should be reversed; (4) whether the slander award for the statements made by Mass Mutual employees to Litman's former insurance salesmen should be reversed; and (5) whether the record is sufficient to sustain an award of punitive damages. Finding that the statement made by Mass Mutual to Litman's prospective employer was invited and as such not actionable as slander, we reverse the district court's award of $100,000 based upon this statement. Accordingly, we hold that the issue of punitive damages, damages which were in part based upon such slander, must be returned to the district court for a new trial. We find appellant's remaining claims to be without merit and therefore affirm the district court's decision as to the remainder of the judgment.

I. FACTS AND PROCEDURAL HISTORY

Bernard Litman, a former life insurance agent for Penn Mutual Insurance Company in New York, joined Mass Mutual as a salesman in 1957. He moved to Miami in 1959 and became a staff supervisor and later an assistant general agent in the south Florida area. Litman was recruited by James Martin, then Mass Mutual's vice president in charge of sales, to become a "general agent" of the company.[1] He was given the option by Martin to become a "formula" or a "non-formula" general agent. Under the "formula" arrangement, as explained to Litman, the company pays all of the general agent's expenses and has complete control over the agency; under the "non-formula" arrangement, Mass Mutual contributes to the payment of some expenses for a limited period of time, but the general agent remains autonomous, personally responsible for most of the expenses of developing and operating his agency. Litman elected to proceed as a non-formula general agent.[2]

Following Litman's initial recruitment in Miami, he was invited to the home office and presented with a standard form "General Agent's Contract." Litman signed the contract on January 15, 1962, in Springfield, Massachusetts, for an agency

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1 Under Mass Mutual policy, a "general agent" contracts directly with the company and is responsible for recruiting, contracting with, and managing the individuals who actually "sell" the company's insurance products. The "salesmen", who are employees of the general agent rather than of the parent company, are referred to as "agents" in the industry and throughout this opinion.

2 Testimony at trial adduced that a non-formula general agent customarily begins his business in a precarious, cash-poor financial position because the bulk of his expenses are not paid by the defendant and because the bulk of his compensation is deferred. Specifically, when an insurance policy is sold by one of an non-formula general agent's "agents," the general agent's commission is not paid immediately; rather, a portion of it is paid in the second year of the policy's existence, and the remainder is paid out incrementally over the next fourteen years, as long as the policy continues in existence. Half of the commissions are vested, i.e. they are payable even if the general agent is terminated or dies; and half are non-vested, i.e. in the case of termination or death they are retained by the company. R.Vol. 7 at 158-60.

located in Miami, Florida. The contract was signed on behalf of Mass Mutual by the company's vice-president in charge of production. Litman was told during his subsequent "indoctrination" that a general agency required a tremendous initial investment of time, energy and money; as a result, he became extremely concerned about the termination provision in the contract, which appeared to him to provide that Mass Mutual could terminate him simply by providing him with a written notice of termination. Reluctant to proceed on this basis, Litman asked Robert Albro, the agency secretary of Mass Mutual and the officer who had originally presented Litman with the contract for execution, for a "guarantee" that he would not be terminated but for a legitimate reason. Litman testified that he recalled Albro's response to be as follows:

> As best I recall, Mr. Albro said to me that this would be a much more difficult question to answer if he were dealing with a general agent, a prospective general agent coming from another company. But the relationship that he and I had, the respect that we had and assumed that I had for the respect of Mass Mutual made it very easy. That there was no way in the world my contract would be terminated on the whim of anybody. That he was fully aware of the time, effort, and money that I had to put into it. And that I was going to run my own shop. He was careful to point out, although you have no reason to assume it would occur, that because I was responsible for handling large amounts of money, responsible for submitting and transmitting information to the home office on which they made decisions to underwrite insureds, that any act of fraud of that type or lack of fiduciary capacity would be a cause and the only cause for terminating my contract.

Record Vol. 7 at 175-76. Litman further testified that he "agreed to that," that he "relied upon that," and that he "agreed to go forward" because of the statement. Record Vol. 7 at 174-75. Albro testified that he had no recollection of a meeting with Litman in 1962; that he would never have told

any general agent that he would only be terminated for fraud; and that he may later have told the plaintiff that a general agent would only be terminated for "good cause." Record Vol. 9 at 617-24.

The bulk of the evidence in the record relates to the ongoing relationship of Litman and Mass Mutual from 1962 through his ultimate termination by the company fifteen years later. Litman borrowed extensively in order to capitalize his business both through local banks and from Mass Mutual (in the latter instances, using his vested commissions as security for the loan). Furthermore, Litman's agency in its early years was characterized by rapid growth and therefore rising expenses, generating a cash-flow shortage. Not wishing to discourage growth in production by its general agencies, Litman was frequently asked to control this inherent problem by reducing his expenses. From the beginning of the relationship through 1975, Litman's primary contact with Mass Mutual was with Frank Meeske, the company's "Director of Agencies." It is uncontroverted that Litman's agency was quite successful during its first decade in terms of generating policies and premiums; the production number showed a steady increase throughout each year of operation. Meeske, however, was concerned that Litman was spending too much of his income on his employees, and Meeske maintained the pressure on Litman to control his expenses.

In 1974, the bottom fell out of the real estate market in south Florida, and drastically altered the insurance business in general. Three of Litman's agents departed and his agency's total production for the years 1974-1976 resultingly dropped from its production level in 1973. This downturn generated concern at the home office, and in 1975 Litman was called to Mass Mutual's Springfield headquarters to attend a meeting at which he was told that he was "bankrupt." During the meeting, Litman conferred with the company's chief financial planner, Emmett Jergensen, who was intimately familiar with Litman's past. Jergensen worked up a conservative, detailed projection of Litman's anticipated income and expenses through Litman's retirement in 1986, and provided a "recovery

plan" (which included an additional loan from the company) intended to solve Litman's perceived financial problem. Litman agreed to abide by the plan.

Meeske retired in 1976 and Walter (Derby) Wilson was placed in charge of the agency division. Berk Ingram was also promoted to the position of executive vice-president at this time. Both Wilson and Ingram questioned Litman's capabilities and considered his autonomy harmful to Mass Mutual. The loan request contemplated by Jergensen's projection came under scrutiny, and the company officers contemplated a strategy whereby Mass Mutual would have much greater control over Litman's agency.[3]

Soon thereafter, Wilson called Litman to a meeting at the home office. Upon arrival, Litman was handed a letter (dated March 28) in which Wilson had demanded that Litman comport his activities in numerous areas to the dictates of "the company." Litman was quite upset by the letter and refused to

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3 This intent is exemplified in a memorandum written on March 24, 1977, by Ingram to Wilson in connection with Litman's loan request. The memorandum begins:

> As we discussed at length today, Jim Martin rather reluctantly said he would grant an additional $20,000 formal loan to Bernie Litman. The real problem we have with Bernie and his agency far transcends an additional $20,000. Bernie has somehow or other stayed on his feet through the regimes of Jim Martin, Bill Clark, Berk Ingram and, so far, Derby Wilson. Unless he makes basic changes, (which I think is improbable if not impossible), his luck will probably run out approximately two years from now.
>
> In a way, I look upon this additional grant as an opportunity to give you, Bob DeValle and Gerry Griffin a chance to get into that agency and Mass Mutualize it to such an extent we will minimize Bernie's chances of taking many of his good agents with him to another company. Furthermore, even if his clock does stop two years from now and if, in fact, we have made him make his monthly repayments on his debt and if, in fact, the agency does do well thus increasing Bernie's vesteds and if we have a much better control over his agency, then perhaps we will be in a better position financially in our deal with him than if he were allowed to fail at this time . . . .

The remainder of the memorandum enunciates a list of things to be done to "Mass Mutualize" Litman's agency. Plaintiff's Exhibit 6.

sign it. Wilson also produced a check in the amount of the pending loan request and took Litman into the office of James Martin, the Chairman of the Board. Martin stated that authorization for the loan had not been obtained, refused to permit delivery of the check, and instructed Litman to meet with Jergensen to work out a new "recovery plan." Litman did meet with Jergensen, but returned to Miami without the check and later learned that the revised plan had been disapproved.

Litman then received another letter (dated May 6) from Wilson, which reiterated several of the demands made in the March 28 letter and which also insisted that Litman's employees "identify . . . Mass Mutual on the telephone" when answering it. Litman refused to sign this letter as well. On May 25, proceeds of a new $20,000 loan were delivered.

On June 13, Litman wrote Wilson a letter expressing his frustration at the methods by which he had recently been treated by the company. Because this letter was not answered, Litman phoned G. Barton Griffin, Wilson's assistant, on June 22 to reiterate his complaints; Litman told Griffin that while he was "not negotiating with any other company," Mass Mutual's treatment of him had prompted Litman to "seek other options." Griffin advised Wilson that he assumed Litman to be negotiating with other companies. On the same day, Wilson called Litman and advised him that he had heard of Litman's employment negotiations with other companies; Litman denied such negotiations and explained that he had made appointments with representatives of other companies only to obtain advice concerning the problem Litman was having with the Mass Mutual officers. Wilson insisted that Litman cancel the appointments, threatening that otherwise Litman's resignation would be requested. Litman stated that he was unable to do that, and the conversation ended. The next day, Wilson instructed Griffin and Robert DeValle to go to Miami in order to ask for Litman's resignation. Thereafter, DeValle and Griffin met with Litman; Litman was terminated, effective June 28, 1977, when he refused to resign.

After the termination, DeValle held a meeting with the clerical and secretarial staff of Litman's agency in order to

announce the agency's termination and to assure the staff that their jobs were secure. A second meeting was held with the agency's insurance agents, during which essentially the same announcement was made.

Within the next two or three days, Litman claimed that Griffin and DeValle met with each of his agents and told some of them upon inquiry that Litman was terminated because he had "serious financial problems" or because he was a "lousy" or "bad businessman." Record Vol. 7 at 234. Griffin and DeValle testified that the reasons for these discussions were to keep good agents from leaving, to squelch rumors, to alleviate concern about each agent's future and to answer their questions as to why Litman was terminated. Record Vol. 9 at 632-36, 670. DeValle also indicated that Litman gave his permission to tell the agents the reason for the termination; however, Litman denied such permission. Record Vol. 9 at 650.

Subsequent to Litman's termination, Litman applied to several companies in pursuit of a general agency position. One of the companies contacted was Travelers Insurance Company, whose negotiations with Litman were conducted by James Farney, Travelers' National Director of General Agencies. Litman directed Farney to contact James Martin, Mass Mutual's Chairman of the Board and Chief Executive Officer, as a reference, despite being told by Mass Mutual upon termination that he had ". . . very serious financial problems." Farney called Martin and was told that their discussions were confidential. Farney testified that Martin was very complimentary of Litman in terms of Litman's recruitment, training and the quality of Litman's business. Farney then inquired as to Mass Mutual's "problem" with Litman, and Martin responded that Litman ". . . didn't pay his business bills." Record Vol. 7 at 130-31. Martin did not discuss Litman's termination in detail with Farney and Farney testified that he "felt confident that [Litman's credit practices] were not a problem." Record Vol. 7 at 131-32. Litman was made a general agent for Travelers on September 15, 1977, a position which he held during the pendency of trial in this action.

On June 19, 1978, Litman filed a four-count complaint against Mass Mutual in the Dade County Circuit Court. Count I alleged the wrongful breach of Litman's written career contract with Mass Mutual. Count II alleged the wrongful breach of the employment contract as orally modified. Count III sought recovery for slander, alleging as improper both the statements made by Griffin and DeValle to Litman's agents and the comments by Martin to Mr. Farney, and Count IV prayed for an accounting.

The case was removed to the United States District Court for the Southern District of Florida and Mass Mutual filed a motion to dismiss. The district court dismissed Count I on the grounds that, by its terms, the contract was terminable at will. The court denied the motion to dismiss the remaining counts and stated in its order that Count II would also sustain a cause of action for promissory estoppel.

Thereafter, Mass Mutual answered the complaint, denied the material allegations and specifically asserted several affirmative defenses. The trial court later denied the company's motion for summary judgment directed to Count II. As to Count III claiming slander, Litman's motion for summary judgment was denied in part and granted in part. The court ruled as a matter of law that if the jury were to find that the statements attributed to Griffin and DeValle were made and published, such statements are slanderous *per se*. The statement made by James Martin was found to have been published and the court held that it was slanderous *per se*.

The case was tried before a jury commencing on April 19, 1982. The court denied the company's motion for a directed verdict at the conclusion of the plaintiff's case and at the conclusion of all the testimony. A final judgment was entered on April 30, 1982. The defendant on May 10, 1982, filed motions for judgment notwithstanding the verdict and for a new trial. The court denied the defendant's post-trial motions in a December 7, 1982 order. On January 4, 1983, Mass Mutual appealed to this court.

II. SUFFICIENCY OF THE EVIDENCE TO SUPPORT JUDGMENT ON BREACH OF CONTRACT CLAIMS

A. *Albro's Authority*

Mass Mutual claims that it is entitled to judgment on Litman's claim that it breached the employment contract at issue, as orally modified by Albro, because Albro's corporate "authority" to enter into such an agreement was not proven. It is true that under Massachusetts law,[4] the burden is on a plaintiff to show that an employment contract was either made or ratified by an officer having authority to bind that corporation. *Rydman v. Dennison Manufacturing Co.*, 373 Mass. 855, 366 N.E.2d 763 (1977); *Lucey v. Hero International Corp.*, 361 Mass. 569, 281 N.E.2d 266 (1972); *Thali v. Friden Calculating Machine Co.*, 338 Mass. 67, 153 N.E.2d 658 (1958). However, the record clearly forecloses this challenge.

In the district court proceedings, Mass Mutual never advanced the contention of lack of authority until late in the game; we therefore find them to have waived this issue for the purposes of appellate review. The company did not raise this issue in its answer; it was not mentioned during Litman's deposition; further, it was not listed in the pre-trial stipulation as an issue of fact to be tried. The question of authority was not raised until the close of the plaintiff's case, at which time the defendant moved for a directed verdict on this ground. The court summarily denied this motion. A fair reading of the record convinces us that the trial court concluded this issue had not been properly reserved for trial and was thus waived. Under the facts of this case, we find no error. *See* 9, C. Wright & A. Miller, *Federal Practice and Procedure* § 2534 (1977); 5A J. Moore & B. Ward, *Moore's Federal Practice* ¶ 50.05[1] (2d ed. 1983). The defendant again moved for directed verdict at the close of all the evidence but did not assert this ground for

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4 It is uncontroverted that the breach of contract issues are to be decided under Massachusetts' law, as stipulated in the general agent's contract signed by Litman, with the measure of damages as to all claims and the slander issues to be determined under Florida law.

judgment in that motion. This ground was included in defendant's brief supporting the motion for judgment n.o.v. However, as this motion is technically only a renewal of the motion for a directed verdict made at the close of the evidence, a party cannot assert a ground that was not included in its motion for a directed verdict. *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835 (5th Cir. 1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976);[5] *see* Wright & Miller § 2537; *Moore's Federal Practice* ¶ 50.08. At this point it appears there was a double waiver of this issue.

Further, Mass Mutual did not object to the trial court's jury instructions on the ground of failure to instruct on the authority issue, nor did it mention the issue in its own proposed jury instructions. It did not request that this issue be submitted to the jury in the special interrogatory verdict form which it proposed, nor did it request that the special verdict form which the trial court ultimately determined to give to the jury include this issue. Under such circumstances, the defendant has waived the issue. Fed.R.Civ.P. 49(a). For all of the above reasons, we find that this issue is not properly before this court.

B. *Proof of the Contractual Modification*

Mass Mutual next contends that it is entitled to judgment on Litman's breach of contract claim because Litman did not prove a valid oral modification. As grounds for this contention, the defendant argues that two written amendments to the contract vitiate the prior oral agreement. It also claims that Albro's promise can only be interpreted as a "friendly assurance" or as a "statement of opportunity." Finding the issue as to whether or not a valid oral modification took place to be a proper jury question, we find this argument to be an insufficient basis for reversal.

Mass Mutual's contention that a 1967 and a 1975 written amendment to the contract vitiate the oral agreement between

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5 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Litman and Albro is without merit. The amendments have nothing whatsoever to do with the grounds required to support a valid termination; they rather merely change the payment schedule for commissions after termination. Nothing in the amendments is inconsistent with the prior oral modification, nor do they purport to modify its subject matter in any way. This contention falls far short of that required to properly keep the oral modification issue from the jury.

We likewise disagree with defendant's argument that Albro's promise was merely a "friendly assurance" or "statement of opportunity." At the minimum, in light of Litman's unequivocal testimony that Albro promised him that fraud or breach of fiduciary duty would be the sole cause for termination of his contract, the proper interpretation of Albro's statements was a factual issue for determination by the jury. It is clear that the evidence was conflicting as to many of the issues, including this one, surrounding the alleged oral modification. In such a situation, as the Supreme Court has stated,

> [c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944).

Spurlin v. General Motors Corp., 528 F.2d 612, 619-20 (5th Cir. 1976). *Accord Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*).

C. *The Consideration Issue*

Mass Mutual next contends that it is entitled to judgment on Litman's breach of contract claim because no consideration was given for Albro's promise other than the services incident to the employment. We reject this contention, however, for it has long been held in Massachusetts that where a contract is substantially modified by agreement of the parties the additional obligation requires no new consideration, as the modi-

fied contract takes effect by way of substitution. *See Johnston v. Holiday Inns, Inc.*, 565 F.2d 790 (1st Cir. 1977); *Stevens v. G.L. Ruyo & Sons*, 209 F.2d 135 (1st Cir. 1953); *McFaden v. Nordblom*, 307 Mass. 574, 30 N.E.2d 852 (1941); *Zlotnick v. McNamara*, 301 Mass. 224, 16 N.E.2d 632 (1938); *Earnschaw v. Whittemore*, 194 Mass. 187, 80 N.E. 520 (1907). It is entirely reasonable that the jury could have found such a substantial modification to have been effectuated. It is also reasonably inferable from Litman's testimony that he would not have gone forward with his contract had he not received Albro's assurance that he would not be terminated except for fraud or breach of fiduciary duty. The jury could thus have found a refusal to perform by Litman and a modification of the contract in order to secure his performance on the part of Mass Mutual. In such a situation, Massachusetts' law dictates that the consideration for continuance or performance is sufficient. *See Stevens v. G.L. Ruyo & Sons, supra*; *Kuzmeskus v. Pickup Motor Co.*, 330 Mass. 490, 493, 115 N.E.2d 461, 463 (1953); *Kirkley v. F.H. Roberts Co.*, 268 Mass. 246, 252, 167 N.E. 289, 290 (1929); *National Electric Signaling Co. v. Fessenden*, 207 F. 915 (1st Cir. 1915); *Rice v. Dwight Manufacturing Co.*, 56 Mass. 80 (1848); *Munroe v. Perkins*, 26 Mass. 298 (1830).

D. *The Parol Evidence Rule*

Mass Mutual next contends that it is entitled to judgment on Litman's breach of contract claim on the grounds that the parol evidence rule bars enforcement of the oral modification.[6]

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6 Litman argues persuasively that because this contention was not raised in either of Mass Mutual's motions for a directed verdict, nor in its motion for judgment n.o.v., it has not been presented for review. Mass Mutual claims that because the parol evidence rule is substantive rather than procedural law in Massachusetts, *see Mears v. Smith*, 199 Mass. 319, 85 N.E. 165 (1908), the trial court's ruling adverse to Mass Mutual on this claim on summary judgment relieved the defendant from the obligation to later raise the issue. Because the parol evidence rule is clearly inapplicable to the facts at issue here, we need not decide whether the defendant waived the parol evidence objection under these facts.

The defendant does not argue that the parol evidence rule bars proof of the oral modification, as the rule does not encompass oral modifications made subsequent to the execution of a written contract. Rather, it argues that the oral modification should not be enforced due to the existence of the written amendments to the agreement which failed to include the alleged oral modification. Mass Mutual relies upon several decisions for this broad proposition; however, in each decision, the "amendment" which was found to bar enforcement of a prior oral agreement was a fully integrated written contract covering every facet of the parties' relationship, and the integrated agreement contained a term clearly inconsistent with the prior oral agreement. *See Coiffure Continental v. Allert*, 518 S.W.2d 942 (Tex. 1975); *Vulcan Materials v. Douglas*, 131 Ga.App. 21, 205 S.E.2d 84 (1974); *Matthew v. American Family Mutual Insurance Co.*, 54 Wis.2d 336, 195 N.W.2d 611 (1972). In those circumstances, a straightforward application of the rule results in non-enforcement of the prior oral agreement. By contrast, as mentioned above, none of the written amendments to Litman's contract contain any language purporting to modify the termination provision of the contract. None of the amendments, therefore, can be considered a fully integrated agreement sufficient to invoke the bar of the parol evidence rule.

E. *Proof of Promissory Estoppel*

Mass Mutual next contends that Litman did not establish at trial a prima facie case as to his alternative argument of "promissory estoppel." *See* Restatement (Second) of Contracts § 90.[7] We disagree, for there was extensive testimony before

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7 The Restatement of Contracts § 90 provides:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

(*footnote continued*)

the jury that Litman's career as a general agent required a substantial investment in time, energy and money before its benefits would ever be reaped. Litman also testified that he relied on the understanding that his position was safe until retirement, unless he committed fraudulent acts, in borrowing large amounts of funds for operation of the agency. We find, therefore, that whether Litman's "reliance" on the oral promise was "reasonable" and whether an injustice could only be avoided by the imposition of appropriate damages, to be clear jury questions on these facts.

F. *The Proof of Damages*

Mass Mutual next contends that it is entitled to judgment on both of Litman's contract claims on the basis that Litman presented no competent evidence of his damages. We find no merit to this contention.

It is well established that future damages of the type awarded to Litman are recoverable in Florida if "the amount can be established with reasonable certainty . . ." *Twyman v. Roell*, 123 Fla. 2, 166 So. 215, 217 (1936). The impossibility of calculation with "absolute exactness" will not defeat recovery. *McCall v. Sherbill*, 68 So.2d 362 (Fla.1953). Although future damage awards in the form of "lost profits" are often difficult to prove and inherently suspect, Florida has long allowed their recovery where an "established business" with a long track record has gone under due to a defendant's breach. The courts have reasoned that such a business record provides a solid foundation upon which future projections can reasonably be made. *See New Amsterdam Casualty Co. v. Utility Battery Manufacturing Co.*, 122 Fla. 718, 166 So. 856 (1935).[8]

Contrary to Mass Mutual's assertion, this theory of contractual recovery *is* recognized in Massachusetts. *See Loranger Construction Corp. v. E.F. Hauserman Co.*, 6 Mass.App. 152, 374 N.E.2d 306, *aff'd*, 376 Mass. 757, 384 N.E.2d 176 (1978).

8 Although Florida law is, by the parties' consent, dispositive of the damages issues, we note that plaintiff's evidence in this case would likewise

We find that the facts of this case support the jury's award of future damages. Litman's business was in existence for fifteen years; its regular growth and its profits and expenses were listed extensively in the record at trial. Furthermore, the projection of Litman's future profits, a projection upon which the award of future damages was based, was prepared by the *defendant's* in-house expert, Emmett Jergensen. This evidence in the record clearly establishes a sufficient basis for the jury's award of future damages.

III. THE CLAIM OF ENTITLEMENT TO A NEW TRIAL ON THE BREACH OF CONTRACT ISSUE

The defendant contends that he is entitled to a new trial because the trial court did not submit to the jury the first question on its proposed verdict form. The question read as follows:

> Do you find that the written General Agency Agreement entered into between Massachusetts Mutual Life Insurance Company and Bernard Litman was modified by the parties' subsequent course of conduct [or oral representations]?

Record Vol. 5 at 680. The district court rejected this question in favor of the following:

> Did Massachusetts Mutual Life Insurance Company wrongfully breach a modified contract existing between Bernard Litman and Massachusetts Mutual Life Insurance Company?

Record Vol. 4 at 610. Mass Mutual contends that the question actually submitted to the jury effectively directed a verdict on the issue of modification by concluding for the jury that the contract had already been modified. We disagree.

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support a claim of future damages under Massachusetts law. *See Knightsbridge Marketing Services, Inc. v. Promociones Y Proyectos, S.A.*, 728 F.2d 572 (1st Cir. 1984).

A trial court has considerable discretion in the manner in which special interrogatories are formulated; it may combine several elements of a single claim into a single question, as long as the question is fair and does not combine two issues disjunctively. *See* Wright and Miller §§ 2506, 2508; *Moore's Federal Practice* ¶ 49.03[2]. The question submitted to the jury in this case was in the conjunctive; it simply combined the issue of modification with the issue of breach, and the jury was required to find the existence of both elements of plaintiff's claim before it could rule in plaintiff's favor. We find that the question was not unfair to the defendant and that the trial court was well within its discretion in approving the question in the form in which it was given.[9]

IV. THE SLANDER AWARD BASED UPON JAMES MARTIN'S STATEMENT TO JAMES FARNEY

Mass Mutual next contends that it is entitled to judgment on Litman's slander action for the statement of Martin because the statement was, as a matter of law, not actionable slander. The defendant presents several distinct arguments in support of this contention; however, we agree with defendant's claim that the statement is not a "publication" under Florida law and find this dispositive of the issue.

It is axiomatic that "invited defamation", or the issuance of a defamatory statement wherein the injured party precipitated the statement's release, is not actionable. The Restatement of Torts 2d § 583 (1977) states this principle as follows:

> . . . the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation.

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9 Mass Mutual also contends that it is entitled to a new trial on the breach of contract claims because the trial court did not strike the testimony of one witness, Robert Oliver, concerning the company's policy of encouraging the termination of troublesome career agents. In light of our finding that the defendant's motivation for terminating Litman was very much an issue at trial, both in regard to the breach of contract claims and to the slander claims (as to which defendant's prime defenses were truth and "good motives"), we hold that this claim is without merit.

Accord, Johnson v. City of Buckner, 610 S.W.2d 406 (Mo.1980) (plaintiff requested explanation for termination in presence of third parties); *Duncatell v. Universal Life Insurance Co.*, 446 S.W.2d 934 (Tex.1969); *Pierce v. Northwestern Mutual Life Insurance Co.*, 444 F.Supp. 1098, 1101 (D.S.C.1978). Florida has approved this general rule but has couched it in terms of a lack of "publication," one of the elements necessary to establish a prima facie case of slander. *See Maine v. Allstate Insurance Co.*, 240 So.2d 857 (Fla. Dist.Ct.App.1970) ("[A] communication addressed to a third party, procured to be so addressed by the party libeled, does not amount to a publication."). *See also Smith v. Anheuser-Busch Brewing Co.*, 346 So.2d 125 (Fla.Dist.Ct.App.1977).

In this case, Litman knew, prior to authorizing Mr. Farney to call James Martin, that Mass Mutual's position was that Litman was in a financial mess at the time of his termination. The undisputed testimony was that Litman gave Mr. Farney ". . . a complete right to check on anything and everything [Litman] did in the past." Record Vol. 7 at 239. Farney testified that he was looking "for both good and bad information," and that he posed the question to James Martin, ". . . what was the problem as far as Mass was concerned?" Record Vol. 7 at 127, 130. It was only then that Martin alluded to the fact that Litman did not pay his business bills. Under these circumstances, we hold that Litman invited and consented to the publication of the alleged defamation to Mr. Farney. The statement is thus not actionable and we reverse the district court's judgment with respect to this slander claim.

V. THE SLANDER AWARD BASED UPON THE STATEMENTS OF DEVALLE AND GRIFFIN

A. *Truth and Good Motives*

Mass Mutual next contends that it is entitled to judgment on Litman's slander action for the statements of DeValle and Griffin because the statements were true and made with good motives as a matter of law. We disagree. The record reflects much disagreement as to whether Litman was in fact a "bad

businessman" and the evidence is also conflicting as to whether Litman was terminated because of any perceived financial problems, because of his refusal to cancel his appointment with other companies, or because of the general animosity existing between Litman and Mass Mutual's corporate officers. For these reasons, we find that the jury could have properly found that Litman was not a "bad businessman," as alleged by Griffin and DeValle, or that he was not terminated for that reason. A jury question was also presented on the issue of "good motives". We find from the evidence that the jury could have properly determined that the statements were not made for the benefit of Litman's agents, but rather to minimize the chances that they would follow Litman elsewhere.

B. *Privilege*

Mass Mutual next claims that DeValle's and Griffin's statements were privileged as a matter of law. This contention is also erroneous. Florida law dictates that before a qualified privilege arises for a slanderous statement, it must be shown that the party making the defamatory statement had a duty or a right, in the interests of society, to make the statement. *See Abraham v. Baldwin*, 52 Fla. 151, 42 So. 591 (1906); *Lundquist v. Alewine*, 397 So.2d 1148 (Fla.Dist.Ct.App.1981). The jury found no such duty or right; to the contrary, the jury found that the statements were "made with willfulness and malice and reckless indifference to the plaintiff's rights." Record Vol. 10 at 937. We find, for the reasons stated above, that there was sufficient evidence to support this finding.

C. *Slander Per Se*

The defendant next contends that the trial court erred in holding that DeValle's and Griffin's statements were actionable *per se* and in instructing the jury to that effect. We find no such error. A slander which imputes to the plaintiff a matter which reflects adversely upon him in his occupation has long been held actionable *per se* in Florida. *See Teare v. Local Union No. 295 of the United Ass'n of Journeymen and*

Apprentices of Plumbers and Pipe Fitters Industry of U.S. and Canada, 98 So.2d 79 (Fla.1957); *LeMoine v. Spicer*, 146 Fla. 758, 1 So.2d 730 (1941); *Commander v. Pedersen*, 116 Fla. 148, 156 So. 337 (1934). We find the comments that Litman was terminated because he was a "bad businessman" or "lousy businessman" to fall well within this category.

D. *The Amount of the Damages*

The defendant contends that it is entitled to a new trial on the issue of the amount of compensatory damages awarded for the statements of DeValle and Griffin because the amount was unsupported by the evidence. We disagree, finding that the evidence can easily be interpreted to prove extensive damage to Litman's reputation resulting from these statements. Mass Mutual's own president, William Clark, testified that the insurance industry is a closed fraternity; that the treatment of general agents becomes known in the industry; and that he would expect the entire industry to know about the slanderous statements. Record Vol. 8 at 541-43. There was also evidence that the statements were widely disseminated and that Litman's reputation was severely tarnished. *See* Record Vol. 7 at 142, 325, 331-45, 365, 377-78, 401. Because the several elements of damages to which Litman is entitled are intangible, the amount of which rested largely in the jury's discretion, we find no abuse of discretion in the trial court's acceptance of the verdict.

VI. PUNITIVE DAMAGES

Mass Mutual finally contends that it is entitled to judgment on the issue of punitive damages. The company argues alternatively that the amount of punitive damages awarded is excessive and that it is entitled to a new trial on that ground. We find the jury's determination that the statements by DeValle and Griffin were made with a malicious purpose and with reckless indifference to the plaintiff's rights to adequately support the punitive damage award for those slanderous statements. However, in view of our reversal of the slander award

based upon the statements of James Martin, we must remand the punitive damage issue to the district court for a new trial. This result is inavoidable in light of the fact that the jury's $250,000 punitive damage award was made in response to a single question on the special verdict form: "What amount of punitive damages do you assess against the defendant, Massachusetts Mutual Life Insurance Company for the slander?" Record Vol. 10 at 938. Although Florida has disavowed the rule that punitive damages must bear some relation to compensatory damages, *see Wackenhut Corp. v. Canty*, 359 So.2d 430 (Fla.1978), it must be remembered that punitive damages are awarded upon a theory of punishment, of penalty for outrageous conduct. *See Jones v. Greeley*, 25 Fla. 629, 6 So. 448 (1889). The Florida Supreme Court has further held that a new trial or a remittitur may be ordered if the manifest weight of the evidence demonstrates that the amount of punitive damages assessed was out of all reasonable proportion to the defendant's malice. *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039 (Fla.1982). Because we have held that the statements made by James Martin to Mr. Farney cannot be slanderous as a matter of law, we accordingly cannot approve a punitive damage award based partly on the perceived outrageousness of that statement.

VII. CONCLUSION

We hold that the statement made by James Martin of Mass Mutual to Litman's prospective employer cannot as a matter of law be actionable as slander; we accordingly reverse the award of $100,000 based upon this statement. We likewise hold that the award of punitive damages must be reversed and the issue remanded for a new trial. As to all other claims, the judgment of the district court is affirmed.

AFFIRMED in part, REVERSED in part and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-3314-CIV-EBD

BERNARD LITMAN,

Plaintiff,

—vs.—

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendant.

ORDER ENTERING FINAL JUDGMENT IN FAVOR OF PLAINTIFF

THIS MATTER came on for consideration on remand from the Court of Appeals for the Eleventh Circuit for a new trial on the issue of punitive damages. *See Litman v. Massachusetts Mutual Life Insurance Co.*, 739 F.2d 1549, 1562 (11th Cir. 1984). The Eleventh Circuit affirmed the verdict for Plaintiff on contract damages and one slander award; it reversed the other slander award and remanded the award of punitive damages for a new trial.[1] The Eleventh Circuit held, as a

1 Plaintiff, who was terminated by the Defendant in June, 1977, was a former general agent for the Defendant insurance company. This action results from the events surrounding the 1977 termination, including two sets of statements by employees of the Defendant which the jury found slanderous. Based on the jury verdict, this Court entered final judgment in favor of the Plaintiff. The Plaintiff won an award of $2,000,234.00 for breach of contract compensatory damages; $100,000.00 in compensatory damages for slanderous statements made by a Massachusetts Mutual spokesman to a prospective employer of Plaintiff; $150,000.00 in compensatory damages for a separate slander resulting from statements made by two Massachusetts Mutual employees to Litman's former insurance salesmen as to the reasons

matter of law, that one award for slander was in error because the statements were not actionable slander. *Litman v. Massachusetts Mutual Life Insurance Co.*, 739 F.2d 1549, 1560-1561 (11th cir. 1984). Therefore, the punitive damages award was flawed because this Court incorrectly instructed the jury to answer the question of the amount of damages which should be awarded for "the slander",[2] without separating punitive damages as to each of the two slanders. The award of $250,000 to Plaintiff in punitive damages covered both slanders, only one of which was upheld on appeal. *See Litman v. Massachusetts Mutual Life Insurance Co.*, 739 F.2d 1549, 1562 (11th Cir. 1984). Because there were two slanderous statements which were the basis for the jury's award of $250,000 in punitive damages for "the slander", and because the Eleventh Circuit held that one of the statements was not slanderous, the Eleventh Circuit reversed and remanded the punitive damages award for a new trial in which punitive damages should be based solely on the one slanderous statement. The matter is now pending for retrial before this Court.

But a curious situation has arisen. In an effort to avoid further litigation, Defendant would like to waive its right to a new trial on punitive damages, and accept the original jury verdict, even though that verdict was predicated on two "slanders," only one of which was properly before the jury. Plaintiff, on the other hand, opposes Defendant's effort to consent to entry of judgment based on the original verdict and insists upon a new trial, pursuant to the mandate of the Eleventh Circuit.

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for Litman's termination; and $250,000.00 in punitive damages for slander. The Court of Appeals affirmed the $2 million award and the $150,000 award, reversed the $100,000 award, and reversed and remanded the $250,000 award for a new trial because the punitive damages award was for "the slander". *See infra* note 2.

2 The jury was instructed to respond to this question on a special verdict form: "What amount of punitive damages do you assess against the defendant, Massachusetts Mutual Life Insurance Company, for the slander?"

Under the circumstances, the Court concludes that a new trial on punitive damages would be inappropriate, and is not required by the Court of Appeals' mandate. The Eleventh Circuit did not hold that the punitive damages award was excessive as a matter of law,[3] but it is clear that it held that the verdict reflected, in part, allegedly tortious conduct which should not have been before the jury. Hence, the Appeals Court held that the punitive damages award was, to some extent, improperly inflated.[4]

Defendant is offering to pay to Plaintiff the full amount of the jury verdict on punitive damages which was rendered with two slanders under consideration (plus interest). What possible gain, then, could Plaintiff hope for in a new trial in which the jury would be awarding damages based solely on the one slander which should be properly before it? It is true, of course, that every jury is different and another one could possibly come back with a greater verdict even though only one slander is before it. However, our jury system is predicated upon the hypothetical reasonable jury which evaluates the evidence before it and reaches a just and proper result. The first reasonable jury that heard the evidence arrived at a figure for punitive damages of $250,000 based upon two slanders. It follows, inexorbly, that another reasonable jury, when presented with the issue of what amount of punitive damages should be assessed for a single slander, would fix an amount less than or equal to the $250,000 assessed based on two slanders. The Court refuses to expend further judicial resources to enable Plaintiff to "roll the dice" before another

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3 The Court of Appeals did mention the principle that a new trial may be ordered if the amount of punitive damages assessed is out of all reasonable proportion to the defendant's malice. *Litman v. Massachusetts Mutual Life Ins. Co.*, 739 F.2d 1549, 1562 (11th Cir. 1984) (citing *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039 (Fla. 1982). However, there is no explicit finding that the damages award in this case was excessive as a matter of law.

4 We, accordingly, cannot approve a punitive damage award based partially on the perceived outrageousness of [the] statement [that should not have been before the jury]." 739 F.2d at 1562.

jury when that jury would actually be considering less evidence favorable to Plaintiff than the first jury considered.

A trial court is under a strict obligation to follow the dictates of an appellate mandate, without altering or amending it. *See, e.g., Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985). It must implement both the letter and the spirit of the mandate regarding both express and implied holdings. *Id.* (citations omitted). However, a trial court is free to address, as a matter of first impression, those issues which the appellate court did not address. *Id.* at 1119-20 (citations omitted).

This Court does not believe that the issue before it has been addressed by the appellate court. Indeed, this is an issue which arose subsequent to the Court of Appeals' decision. That decision held that one of the slanders which this Court allowed to be presented to the jury was improperly before it, as it was an invited or unpublished statement. *Litman v. Massachusetts Mutual Life Ins. Co.*, 739 F.2d 1549, 1560 (11th Cir. 1984). Hence, a jury instruction which asked the jury to assess punitive damages based on "the slander" allowed the jury to assess punitive damages based on one proper, and one improper, cause of action. Defendant appealled, and the Eleventh Circuit recognized Defendant's right to a new punitive damages trial. The Court does not believe that the Eleventh Circuit has considered the issue currectly presented; that is, may a Defendant, whose right to a new trial has been recognized by the Court of Appeals, waive that right by offering to accept the original judgment, in the situation where the infirmity at the first trial necessarily inflated Plaintiff's recovery?[5] This Court finds that the answer, on the facts of this case, is yes. Therefore, it is

ORDERED AND ADJUDGED that Final Judgment on punitive damages shall be entered in favor of Plaintiff BERNARD

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5 There will, of course, be cases in which the mistaken admission of certain evidence could have affected the jury in an uncertain manner. In such cases a new trial would be required. In the case *sub judice*, however, the effect of admitting evidence of an extra slander could only have inflated the jury's punitive damages award.

LITMAN, who shall recover from Defendant, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, two hundred and fifty thousand dollars ($250,000.00), with interest from the date of entry of the original final judgment in this action, plus the taxable costs of this litigation to the extent not previously recovered. All pending motions are DENIED AS MOOT. The Clerk is directed to close the case.

DONE AND ORDERED this 20th day of August, 1985.

/s/ EDWARD B. DAVIS
United States District Judge

cc: Aaron Podhurst, Esq.
Gerry S. Gibson, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

June 17, 1986

No. 85-5939

BERNARD LITMAN,
Plaintiff-Appellant,

—v.—

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellee.

JOEL D. EATON, Miami, Fla., *for plaintiff-appellant.*

GERRY S. GIBSON, STEEL HECTOR & DAVIS, Miami, Fla., *for defendant-appellee.*

Appeal from the United States District Court for the Southern District of Florida.

Before FAY, Circuit Judge, HENDERSON* and NICHOLS,** Senior Circuit Judges.

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* *See* Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

NICHOLS, *Senior Circuit Judge*:

This suit, for breach of a general agency agreement and for slander, resulted in a jury verdict for Litman, and a panel of this court decided the appeal of Massachusetts Mutual Life Insurance Company (Mass. Mutual) for the most part favorably to Litman, but remanded for a new trial the issue of punitive damages. *Litman v. Massachusetts Mutual*, 739 F.2d 1549 (11th Cir.1984). There had been no cross-appeal. In the court below, Mass. Mutual stipulated it waived the new trial but accepted and would pay the full amount of punitive damages the jury had awarded, $250,000, whereupon the district court entered judgment for that amount. Litman, who did not join in the stipulation, now appeals, alleging the mandate of this court entitled him to a new trial on punitive damages unlimited by the $250,000 or any other ceiling on the amount of jury might award. We affirm.

Facts

The panel opinion cited, *supra*, shows that Litman, a former salesman of Mass. Mutual, rose to become its general agent in Miami, but a falling out occurred by reason of dissatisfaction on the part of Mass. Mutual with aspects of the way Litman ran his business. It terminated his general agency in 1977. Following this, other representatives of Mass. Mutual made to Litman's former employees, and to a prospective new employer, unfavorable comments about his abilities as a businessman, and whether he paid his business debts. Litman sued in the Florida State court, in four counts, two alleging wrongful breach of contract, and two alleging slanders. Mass. Mutual removed the suit to the U.S. District Court where, after trial a jury awarded $2,000,234 for breach by Mass. Mutual of a general agent's contract as orally modified, $100,000 for a slanderous statement to a prospective new employer, $150,000 for slanderous statements to Litman's own former employees, and $250,000 in punitive damages for the slanders, not allocated between the two slander counts. Mass. Mutual's appeal

vigorously and nonfrivolously attacked every part of that verdict, but successfully only with respect to a relatively minor issue. The slanderous statement to a prospective employer the panel held privileged and not actionable as slander. It would have eliminated, besides the $100,000 awarded for that, also any portion of the punitive damages allocated to that count, but unfortunately these damages were not so allocated, and therefore the panel saw no alternative but to reverse the punitive award and it held "the issue remanded for a new trial." There is nothing in the panel opinion to indicate it perceived any "issue" or issues before it as to punitive damages except that they were improperly awarded or excessive because attributable in part to conduct held not tortious, and should be reduced or eliminated.

It was "uncontroverted," as the panel stated, that the breach of contract issues were to be decided under Massachusetts law, as stipulated in the general agency contract, but the measure of damages as to all claims, and the slander issues in all their aspects were to be determined under Florida law, which thus governs the punitive damages question in all its aspects. No punitive damages had been or could be awarded for the breach of contract.

Although on its face the order for a new trial as to punitive damages was a partial success for Mass. Mutual, and in a wholly rational world the punitive damages under one count might be expected to be less than those awarded previously under two, the operation of law does not always transpire according to logic. Both parties, by their acts and by their words, tell us that in their judgment a new jury trial on punitive damages, with the jury equally free to award more or less than $250,000, would probably, perhaps almost certainly, result in more rather than less. The expectations of plaintiff Litman, as stated by counsel to us on oral argument, fall little if at all short of gloating. Under the law of Florida, which governs here, the wealth or net worth of the tort defendant is a factor in assessing punitive damages, though not of course the only one. *St. Regis Paper Co. v. Watson,* 428 So.2d 243 (Fla.1983). In that case, however, a dissent argues it is the *only*

factor controlling the amount of a punitive damages award. Counsel for Litman believes, rightly or wrongly, that the depth of Mass. Mutual's pockets is almost unfathomable.

> Massachusetts Mutual makes 250,000 dollars every six minutes or so. That's not in the record and I made it up. It's an exaggeration, but they make a lot of money.

Mass. Mutual is seen as placed on this earth by a beneficent providence to enrich the party who can claim a punitive damages award against it. It would be arguable to the jury that $250,000 was a mere pin prick that would not have the educational effect on the tort feasor that punitive damages are supposed to have.

Defendant's stipulation to accept the award of $250,000 punitive damages against it is embodied in a document entitled a "waiver of right to a new trial" and "consent to the entry of judgment." It was intended to take effect unilaterally. Litman argued the mandate bound the court to conduct a trial, and another outcome would condone frivolous appeals, as a defendant could ask for a new trial and if it got one, accept or reject it as its advantage might appear. To avoid such frivolity, his argument runs, an appellant who seeks a new trial must take the bad with the good—accepting the new trial, however modified and circumscribed to its disadvantage the new trial may be as actually mandated.

The court in its order stated it was "under a strict obligation to follow the dictates of a mandate," which it must implement both in letter and spirit, citing *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir.1985). But it said, according to the same authority, a trial court is free to address, as a matter of first impression, those issues which the appellate court did not address.

The trial court held that the issue before it had not been addressed by the appellate court, having arisen subsequently. It was—

> may a defendant, whose right to a new trial has been recognized by the Court of Appeals, waive that right by

> offering to accept the original judgment, in the situation where the infirmity at the first trial necessarily inflated Plaintiff's recovery? [Footnote omitted.] This Court finds that the answer, on the facts of this case, is yes.

Accordingly, the court entered judgment for $250,000 with interest from the date of the original final judgment. The rest of it had already been paid.

Discussion

Appellant's brief here relies on the point made in *Piambino v. Bailey, supra, i.e.*, that a trial court may not alter, amend, "or examine" a mandate received from an appellate court, but must enter an order in strict compliance with the mandate, implementing both its letter and spirit. We note *Piambino* also says the trial court must take into account the "circumstances it embraces," 757 F.2d at 1119, *i.e.*, interpret the mandate in light of its background of operating and procedural fact. All this is the "mandate rule," but it is, the *Piambino* panel says at 1120, nothing more than a specific application of the "law of the case doctrine." The exceptions to that doctrine applicable to the mandate rule, are instances of new evidence, an intervening change in controlling law, or a clearly erroneous decision working a "manifest injustice." Appellant adds a point derived from *Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464, 89 S.Ct. 1860, 23 L.Ed.2d 474 (1969), *i.e.*, that (at least in some circumstances) a trial court cannot dispose of a case contrary to a mandate even if all parties stipulate and agree to do so. As Mass. Mutual stipulated here, but not Litman, this appears to appellant as an *a fortiori* case.

The least of the objections to this argument is that appellant did not clearly urge it below. That is, he relied on the mandate but did not spell out the obligations it imposes as he now does. He appears to have derived his awareness of *Piambino* from its citation in the trial court's order. It was then a very recent decision, so lack of previous awareness of it is understandable. It does not, however, add to or change prior case law, as

copiously cited in the *Piambino* opinion. The argument based on it misses the point for the further reason that the district court, well aware of it, clearly had no intention of doing any of the things *Piambino* teaches he must not do. He thought he was interpreting the mandate, not altering, amending, or "examining," it. (We suppose "examining" really means re-examining in this context.) He might have been mistaken, but the suggestion by appellant that he rendered mere "lip service" to the *Piambino* rule is inappropriate and unhelpful to this court. We must and do suppose the district judge acted in entire good faith, and we do not agree he was even mistaken, though we would state the reasons for denying a new trial a bit differently than he did.

It hardly requires citation of authority that a mandate, like any other writing, will at times require interpretation. In *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140, 60 S.Ct. 437, 440, 84 L.Ed. 656 (1940), the Court said;

> The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest [citing case]. That proposition is indisputable, but it does not tell us what issues were laid at rest [citing case]. Nor is a court's interpretation of its own mandate necessarily conclusive.

In *Mercer v. Theriot*, 316 F.2d 635, 638 (5th Cir. 1963), *rev'd on other grounds*, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964), the court holds that the correctness of a trial court's construction of a mandate is an appealable issue:

> Accordingly, it is unnecessary to consider the application of the "law of the case doctrine."

Giving the district court's order the sympathetic consideration it deserves, we note it undertakes to interpret what the previous panel of this court meant when it held that "the

award of punitive damages must be reversed and the *issue* remanded for a new trial." (Emphasis supplied.)[1]

What issue? The district court, in effect, determined that two issues as to punitive damages were now before it, whether they should be reduced as excessive, as Mass. Mutual desired, and whether they should be increased as inadequate as Litman desired. The first of these issues, *i.e.*, reduction of the damages, was dealt with in the mandate and a new trial required, but by its stipulation Mass. Mutual eliminated any dispute of fact applicable to reduction of punitive damages, and the most zealous for the untouchability of mandates would not require a trial when the jury would have no issue of fact to decide. The second of these issues, *i.e.*, of increasing the damages, was new, was not before the appellate panel, and it would be unreasonable to suppose it remanded an issue that had not been before it.

The issue of increasing the punitive damages was not before the appellate panel because Litman had filed no cross-appeal, nor, actually, had he filed any motion for judgment n.o.v. or for a new trial. He told us quite plainly that this was not because he was satisfied with $250,000 of punitive damages, but because Florida law did not recognize that a tort plaintiff had an appealable issue in any insufficiency of punitive damages. The first panel has already determined that Florida law governs this case with exceptions not applicable to the tort counts. Thus, our attention is directed to Florida law as determining whether the panel had or could have had before it an issue as to increase of punitive damages over the $250,000 the jury awarded.

There was none according to a recent decision of the Florida Supreme Court, *St. Regis Paper Co. v. Watson*, 428 So.2d 243 (1983). This case holds, reversing a lower court, that a trial

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1 The mandate (judgment) said the district court's judgment was reversed in part and the cause was hereby remanded to the district court for further proceedings "in accordance with the opinion of this Court." The language quoted in the text is part of the opinion, thus made a part of the mandate by reference.

judge may properly order a new trial if he deems punitive damages are excessive, but not if they are inadequate, unless the jury was improperly influenced or some fraud contaminated the verdict.

The Florida court's explanation for this seeming anomaly is that "a plaintiff has no right to punitive damages." The jury awards them "on behalf of the public, not in the interests of the plaintiff." A *dissent* in that case would have inferred that the jury erred from the disproportion of the punitive damages award, $5,585.25, to an estimated net worth of the defendant, St. Regis Paper Co., of a billion dollars. The *dissent* would have affirmed the grant of a new trial to enable the jury to award more adequate punitive damages, exactly the result sought by the appellant here.

In view of the absence of a cross-appeal and the view Florida law takes of punitive damages, the prior panel did not have any issue before it as to the punitive damages being insufficient. Litman attempted no showing as to the punitive damages verdict being the result of jury misconduct or contaminated by some kind of fraud. The "issue" remanded could not have meant this issue, which was not even before the panel and, on the other hand, the mandate could easily be read as referring to the issue of the punitive damages being excessive, an issue the panel discusses at length. We so construe the mandate and thus the trial judge did not err in his construction. Since the panel remanded only the issue of the award being excessive, it did not intend to require a new trial on terms exposing Mass. Mutual to more punitive damages than $250,000. While the matter is not one for application of "law of the case," it does appear that a holding by the first panel, such as Litman imputes to it, would be clearly erroneous and would work a manifest injustice, and therefore any such construction should be eschewed.

The same considerations obtain if we review the decision below, as we should, on the basis that the remand did not speak as to a new trial on punitive damages so far as the issue would be their increase. The district court made the only possible decision in view of the Florida law.

Conclusion

The judgment appealed from is affirmed.

AFFIRMED.

FAY, *Circuit Judge*, dissenting:

As Oscar Wilde once noted: "In this world there are only two tragedies. One is not getting what one wants, and the other is getting it."[1] Massachusetts Mutual got what it wanted. It appealed the results of the first trial. Among other issues, it challenged the award of punitive damages. Finding problems with the particular award based upon alleged slanderous statements, we affirmed most of the results but vacated the award of $250,000 and remanded for a new trial. *Litman v. Massachusetts Life Insurance Co.*, 739 F.2d 1549 (11th Cir. 1984). Rather than face the obvious consequences of such a proceeding, Massachusetts Mutual now "waives" its right to a new trial and agrees to the reinstatement of the earlier verdict and judgment. The trial court allowed this tactic and the majority now adds its stamp of approval. I respectfully dissent.

Much can be said, and has been, about the parties' motives. Neither is before us on behalf of the integrity of the judicial system. Both are interested in one thing—money. This is not evil, merely the reality of this case.

Frankly, the result in this case is probably just. The first trial involved many hotly contested issues. All were resolved in a fair trial. The overall perspective and balance of such a proceeding is certainly better than a trial on only one issue—particularly one such as punitive damages after an affirmance of liability. But that is not the issue.

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1 *Lady Windermer's Fan*, Act III (1892). This may be the source of the oft repeated caveat given children by some parents, "Be careful what you pray for as you may get it!"

The only issue before us is whether a successful appellant can change its mind and by its unilateral action modify the mandate of this court. I would hold that it cannot. Litigants are always required to "weigh" the prospects of trials and appeals. The list of "what ifs" is endless. But the process does require some order. Courts do not operate at the whim of the parties. *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir.1985) may not be absolutely rigid but surely it stands for something.

Massachusetts Mutual raised many issues on its appeal. It was partially successful. The concluding paragraph of our opinion reads:

> We hold that the statement made by James Martin of Mass Mutual to Litman's prospective employer cannot as a matter of law be actionable as slander, we accordingly reverse the award of $100,000 based upon this statement. We likewise hold that the award of punitive damages must be reversed and the issue remanded for a new trial. As to all other claims, the judgment of the district court is affirmed.

Litman, 739 F.2d at 1562.

The mandate of this court ordered a new trial on the issue of punitive damages.

The law of our circuit concerning the obligations of a trial court to follow our mandates is clear and settled. In *Piambino*, Judge Tjoflat spelled it out in simple direct terms:

> A trial court upon receiving the mandate of an appellate court, may not alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895). The trial court must implement both the letter and the spirit of the mandate, *Nixon v. Richey*, 513 F.2d 430, 435-36 (D.C. 1975), *aff'd on other grounds*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492, 541 (8th Cir. 1975) (en banc),

taking into account the appellate court's opinion, *In re Sanford Fork & Tool Co.*, 160 U.S. at 256, 16 S.Ct. at 293 (1895); *Cherokee Nation v. Oklahoma*, 461 F.2d 674, 678 (10th Cir.), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972), and the circumstances it embraces. *Sherwin v. Welch*, 319 F.2d 729, 731 (D.C.Cir. 1963). Although the trial court is free to address, as a matter of first impression, those issues not disposed of on appeal, *Holcomb v. United States*, 622 F.2d 937, 940 (7th Cir. 1980); *see also*, *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678, 679 (11th Cir. 1984), it is bound to follow the appellate court's holdings, both expressed and implied. *Cherokee Nation*, 461 F.2d at 678; *see also*, 1B J. Moore, J. Lucas, & T. Currier *Moore's Federal Practice* ¶ 0.404[10] (2d ed. 1984). If the trial court fails fully to implement the mandate, the aggrieved party may apply to the appellate court for enforcement, by petitioning for a writ of mandamus.

The "mandate rule," as it is known, is nothing more than a specific application of the "law of the case" doctrine. *Greater Boston Television Corp. v. Federal Communications Commission*, 463 F.2d 268, 279 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972); *City of Cleveland v. Federal Power Commission*, 561 F.2d 344, 348 (D.C. Cir. 1977). This doctrine stands for the proposition that an appellate decision on an issue must be followed in all subsequent trial court proceedings unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice. *Westbrook v. Zant*, 743 F.2d 764, 768-69 (11th Cir. 1984); *Baumer v. United States*, 685 F.2d 1318, 1320 (11th Cir. 1982) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967).

Piambino, 757 F.2d at 1119-20.

It is not even contended that any of the exceptions mentioned in *Piambino* exist here. To suggest that the trial court did not commit error because "he thought he was interpreting the mandate, not altering, amending, or 'examining,' it," *ante* at 857, begs the question. I'm certain the trial judge in *Piambino* "thought" he was interpreting the mandate and not altering or amending it.

Massachusetts Mutual did not withdraw its appeal. It filed no motions in this court to modify or amend the mandate based upon its "waiver" of its new found right to a new trial.

The panel has no right to overrule *Piambino*, directly or indirectly. Our en banc court can take such action but only in accord with proper procedures.

Under the rule announced by the majority, a defendant in a personal injury action might successfully appeal an adverse verdict and yet, thereafter, decide to "waive" a retrial because the plaintiff had since died and the exposure had increased. The reversal might have been based upon "inflated" damages for lost earnings, etc. Retrials are always risky. Life in not static. One party or the other will most often profit.

This "new rule" may shorten some proceedings in the trial courts (although I doubt it) but it will surely multiply appeals geometrically. It will also lead to much uncertainty as litigants suggest their versions of how to interpret a mandate. The "mandate rule" as discussed in *Piambino* is designed to eliminate uncertainty and game playing.

I would require the trial court to proceed with the retrial of punitive damages as ordered.

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Aug. 31, 1987

No. 85-5939

BERNARD LITMAN,

Plaintiff-Appellant,

—v.—

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendant-Appellee.

JOEL D. EATON, Podhurst Orseck Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Miami, Fla., *for plaintiff-appellant.*

GERRY S. GIBSON, Steel Hector & Davis, Miami, Fla., *for defendant-appellee.*

Appeal from the United States District Court for the Southern District of Florida.

Before:

RONEY, *Chief Judge*, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, *Circuit Judges*, and HENDERSON*, *Senior Circuit Judge*.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

FAY, Circuit Judge:

The case was taken in banc to consider whether the mandate in *Litman v. Massachusetts Mutual Life Insurance Co.*, 739 F.2d 1549 (11th Cir. 1984) ("*Litman I*") was properly executed. The mandate included an order for a new trial on punitive damages. The district court did not conduct a new trial, however, because it was of the opinion that the "Waiver of a Right to New Trial and Consent to Entry of Judgment" presented by Massachusetts Mutual ("Mass Mutual") was an acceptable alternative disposition of the case. For the reasons that follow, we find that the district court's order was inconsistent with and in disregard of the law of the case established in *Litman I*. We REVERSE and REMAND for a new trial on punitive damages. Because this case involves the structural relationship between the appellate court and district court within the judicial hierarchy, we examine the creation of the federal court system, the tools that emerged to enforce the three-tier structure and the institutional values the tools are designed to perpetuate.

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* Henderson, Senior Circuit Judge, has elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

I. Historical Perspective of the Organization of the Federal Court System.

Judicial power is created by the Constitution and Congress. Art. III of the Constitution provides: "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., art. III, § 1. As early as 1789, Congress created district courts and circuits courts. Judiciary Act of 1789, ch. 20, 1 Stat. 73. In 1891, Congress passed the Evarts Act, Act of Mar. 3, 1891, 26 Stat. 826, which established the circuit court of appeals as a separate intermediate level court. The primary objective of the Evarts Act was to relieve the Supreme Court of the excessive burden imposed upon it arising from the rapid growth of the country, and the steady increase in litigation, by transferring a considerable part of its appellate jurisdiction to the Circuit Court of Appeals, and making the judgments of that Court final, absent compelling circumstances. *United States v. Dickinson*, 213 U.S. 92, 97, 29 S.Ct. 485, 486, 53 L.Ed. 711 (1909); *American Construction Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 382, 13 S.Ct. 758, 762, 37 L.Ed. 486 (1893). Today's judicial structure emerged when Congress passed the Judicial Code of 1911, Mar. 3, 1911, ch. 231, 36 Stat. 1131, which aligned the circuit courts as those handling most appeals and assigned the district court as the general trial court of original jurisdiction. In so doing, Congress established the three tier system as well as the chain of command within the judiciary hierarchy.

The Constitution confers jurisdictional powers on the Supreme Court. *See* U.S. Const., art. III, § 2. The Court has limited original jurisdiction and exercises appellate jurisdiction, either by direct appeal or by the discretionary writ of certiorari, over the district courts, the courts of appeals, and the highest courts of the states. 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3507 (2d ed. 1984). The Supreme Court has the power to make determinations as to the law of the land that binds all courts. By statute Congress

has assigned jurisdictional powers to both district and circuit courts. The district courts are courts of original jurisdiction. 28 U.S.C. § 1331 (1982). The circuit courts have appellate jurisdiction over district courts, administrative agencies and exercise power to issue original writs in appropriate cases. 13 C. Wright, A. Miller & E. Cooper, *supra*, at § 3506. Appellate courts have the power to issue mandates which are commands that cannot be ignored. Absent a Supreme Court decision to the contrary, district courts are compelled to follow mandates of appellate courts. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895); *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492, 9 L.Ed. 1167 (1838).

The three tier system evolved purposefully and deliberately and operates to define the proper allocation of authority and responsibility within the judicial system. Experience has demonstrated that the system works. Throughout history courts at all three levels have recognized that careful observation of this allocation of authority is necessary for a properly functioning judiciary. When district courts err, appellate courts do not hesitate to correct mistakes and confine the court to its authorized boundaries. When an appellate court errs, the Supreme Court does likewise.

II. Institutional Tools, Values and Illustrations.

There are several methods used to ensure order is maintained within the judicial hierarchy. Pursuant to statutory provisions, appellate courts have the authority to issue writs of mandamus. All Writs Statute, 28 U.S.C. § 1651 (1982). The historic use of the writ of mandamus issued by an appellate court has been to exert its revisory appellate power over the district court. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943); *Ex parte Peru*, 318 U.S. 578, 583, 63 S.Ct. 793, 796, 87 L.Ed. 1014 (1943). The writ affords an "effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so." *Ex parte Peru*, 318 U.S. at 583, 63 S.Ct. at 796. The writ of mandamus,

while an extreme remedy, is still used when a district court usurps power or abuses its discretion. *Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976); *United States v. Fernandez-Toledo*, 737 F.2d 912, 919 (11th Cir. 1984); *In re Extradition of Ghandtchi*, 697 F.2d 1037, 1038 (11th Cir. 1983); *see United States v. Cannon*, 807 F.2d 1528, 1529 (11th Cir. 1986). The writ is a tool used to keep the courts functioning within the constitutional and congressional design.

The Supreme Court, by accepting cases through the discretionary writ of certiorari, has kept order within the courts. The notion that the federal district courts and circuit courts of appeal must adhere to controlling Supreme Court decisions is reinforced whenever necessary. In *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556 (1982), the Court emphasized the need to adhere to the hierarcal structure of the federal court system created by the Constitution and Congress. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Davis*, 454 U.S. at 375, 102 S.Ct. at 706.

A recent case serves as a compelling illustration.[1] In *Jaffree v. Board of School Comm'rs*, 554 F.Supp. 1104 (S.D.Ala.

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[1] For historical illustrations arising out of the Civil Rights era, *see e.g., Gormillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (Supreme Court reversed district court's order, (which was affirmed by court of appeals), dismissing complaint brought by Black citizens of Alabama challenging a legislative act altering city boundaries and effectively depriving Blacks of their right to vote on the basis of race, contrary to the fifteenth amendment); *Meredith v. Fair*, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828, 83 S.Ct. 49, 9 L.Ed.2d 66 (1962) (district court's order denying injunctive relief to Black student seeking entrance into university reversed on the basis of a finding of unlawful racial discrimination); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960) (court reversed district court's order dismissing case holding that segregated seating on buses deprived Black plaintiffs of their constitutional rights); *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 838, 80 S.Ct. 58, 4 L.Ed.2d 78 (1959) (denial of habeas corpus petition reversed by court finding

1983), the district court held that the fourteenth amendment did not incorporate the establishment clause of the first amendment against the States. The district court ruled that the United States-Supreme Court had erred. *Id.* at 1128. Justice Powell, in his capacity of Circuit Justice for the Eleventh Circuit, entered an interlocutory emergency stay of the judgment of the district court and stated that, "[u]nless and until this Court reconsiders the following decisions, they appear to control this case. In my view, the District Court was obligated to follow them. Similarly, my own authority as Circuit Justice is limited by controlling decisions of the full Court." *Jaffree v. Board of School Comm'rs*, 459 U.S. 1314, 1316, 103 S.Ct. 842, 843, 74 L.Ed.2d 924 (1983).

Thereafter, the Court of Appeals for the Eleventh Circuit reversed the district court's order dismissing the complaint, 705 F.2d 1526 (11th Cir. 1983), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984). The Court emphasized the district court's obligation to adhere to Supreme Court precedent. The Supreme Court had considered the historical implications and concluded that its present interpretation of the first and fourteenth amendments is consistent with the historical evidence. *Id.* at 1532. Even though the district court concluded that the Supreme Court erred it was required to follow the controlling decision. *Id.* at 1532; *Stell v. Savannah-Chatham County Bd. of Ed.*, 333 F.2d 55, 61 (5th Cir.), *cert. denied*, 379 U.S. 933, 85 S.Ct. 332, 13 L.Ed.2d 344 (1964). The Supreme Court affirmed the judgment of the court of appeals. *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (this appeal dealt with the narrow question of whether a period of silence for "meditation or voluntary prayer" established religion within the meaning of the first amendment). The message sent to the district court from both the Supreme Court

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that Blacks excluded from serving as jurors on the basis of race, amounted to a denial of equal protection contrary to the fourteenth amendment); *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958) (court reversed the district court and struck down segregation in the railway waiting rooms in Birmingham).

and the court of appeals was clear—it had an obligation to follow precedent.

Many devices have been created to ensure that authority, jurisdiction and responsibility remain properly allocated among the three levels of courts within the federal judiciary. The discussion above merely serves to illustrate the point. The courts within the system have differing responsibilities and standards and values must be formulated and communicated in order to ensure that the process functions.

Institutional tools perpetuate the value of stability and predictability—essential factors in the proper operation of the judiciary. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Predictability is essential not only to lawyers who must advise their clients about the law, but also to the notion of judicial review in creating a stable body of law. It is generally thought that appellate courts are in a better position than trial courts to accommodate the need for stability. Reviewing courts are better able to maintain the necessary continuity of doctrine over time. Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 *Harv.L.Rev.* 542, 551-52 (1969). The uniformity achieved is not necessarily rigid; the appellate court "can change, or can react to advocacy or external reality to alter the direction of its commands." P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal p. 148 (1976). But the primary mission of the courts recognizes this particular feature.

"Judicial precedence serves as the foundation of our federal judicial system. Adherence to it results in stability and predictability." *Jaffree v. Wallace*, 705 F.2d 1526, 1533 (11th Cir. 1983). In *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) the Supreme Court discussed the reasons for adhering to precedent:

> Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expedi-

> tious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Id. at 403, 90 S.Ct. at 1789. "The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity." *Id.* The law of the case doctrine rests on the same principles.

The law of the case doctrine was created to ensure that authority and responsibility remain properly allocated among the courts. The doctrine is based on the premise that an appellate decision is binding in all subsequent proceedings in the same case unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.[2] *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2889, 90 L.Ed.2d 976 (1986); *Westbrook v. Zant*, 743 F.2d 764, 768-69 (11th Cir. 1984); *Baumer v. United States*, 685 F.2d 1318, 1320 (11th Cir. 1982) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)). A district court when acting under an appellate court's mandate, "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895); *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492, 9 L.Ed. 1167 (1838).

The law of the case doctrine, self-imposed by the courts, operates to create efficiency, finality and obedience within the judicial system. *See Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984); *United States v. Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 662 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95

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2 None of these exceptions are material to the case we address today.

S.Ct. 1128, 43 L.Ed.2d 400 (1975); *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). Judicial dispute resolution must have certain essential elements. Due process, as a constitutional value, may be the cornerstone, but finality and stability, as institutional values, may be of equal importance. While the law of the case doctrine is not an "inexorable command,"[3] *White v. Murtha*, 377 F.2d at 431, adherence to it helps to ensure that the essential elements are maintained in the process. Failure to honor its commands can only result in chaos.

The mandate rule is simply an application of the law of the case doctrine to a specific set of facts. *Piambino*, 757 F.2d at 1120 (citations omitted). Each tier in the judicial hierarchy has its responsibility once a mandate is issued. A mandate may be vague or precise resulting from the disposition of those issues presented which vary widely from the rather simple to the most complex. Determining the scope of a mandate can present problems with interpretation. The case law is replete with examples of disputes arising from interpretations of mandates. The disputes focus on the relationship between the appellate courts and district courts and center on the proper allocation of authority and responsibility.

The law of our circuit concerning the obligations of a district court to follow our mandates is settled. *See Piambino*, 757 F.2d 1112 (11th Cir. 1985); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437 (11th Cir. 1984); *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984); *Dorsey v. Continental Casualty Co.*, 730 F.2d 675 (11th Cir. 1984); *United States v. Williams*, 728 F.2d 1402 (11th Cir. 1984); *Robinson v. Parrish*, 720 F.2d 1548 (11th Cir. 1983); *Baumer v. United States*, 685 F.2d 1318 (11th Cir. 1982). All circuits are in accord. *See e.g.*, *Todd Shipyards Corp. v. Auto Transportation, S.A.*, 763 F.2d 745 (5th Cir. 1985); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943 (3d Cir. 1985); *In re Beverly Hills Bancorp.*, 752 F.2d 1334 (9th Cir. 1984); *Devines v. Maier*, 728 F.2d 876 (7th Cir.), *cert. denied*, 469 U.S. 836, 105 S.Ct. 130, 83 L.Ed.2d 71 (1984);

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3 The district court may address issues not disposed of on appeal. *Piambino*, 757 F.2d at 1119; *see Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678-79 (11th Cir. 1984).

Stamper v. Baskerville, 724 F.2d 1106 (4th Cir. 1984); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344 (D.C.Cir. 1977); *Crane Co. v. American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973); *In re United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973); *Cherokee Nation v. Oklahoma*, 461 F.2d 674 (10th Cir.), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972); *Poletti v. Commissioner*, 351 F.2d 345 (8th Cir. 1965); *United States v. Iriarte*, 166 F.2d 800 (1st Cir.), *cert. denied*, 335 U.S. 816, 69 S.Ct. 36, 93 L.Ed. 371 (1948).

When an appellate court issues a specific mandate it is not subject to interpretation; the district court has an obligation to carry out the order. A different result would encourage and invite district courts to engage in *ad hoc* analysis of the propriety of appellate court rulings. Post mandate maneuvering in the district courts would undermine the authority of appellate courts and create a great deal of uncertainty in the judicial process. It would also eliminate any hope of finality.

We recognize that there are cases wherein a seemingly specific mandate such as an order for a new trial may wind up with a different result on remand. However, in such cases the opinion, when viewed in its totality, supports the alternative disposition. *See e.g., Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557 (7th Cir. 1985) (remand for a new trial did not necessarily mean that a trial would be necessary when the district court was instructed to look at the contractual provisions governing termination and then make a "determination of damages"); *United States v. Curtis*, 683 F.2d 769 (3d Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982) (reversal of conviction and remand for a new trial did not preclude district court from dismissing indictment based on double jeopardy claim as constitutional question was not raised on appeal;)[4] *Shelkofsky v. Broughton*, 388

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4 The court in *Curtis* stated:

> The district court indicated in its statements on remand that, aside from any constitutional double jeopardy concern with respect to the rights of the defendant, it might have institutional concerns of its own

F.2d 977 (5th Cir. 1968)[5] (reversal for a trial by jury did not preclude district court from disposing of the case summarily if the evidence offered was insufficient to warrant submission to the jury). Such cases do not weaken the "mandate rule" but give it flexibility. *See Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983).

III. *Litman v. Mass Mutual.*

With the foregoing principles in mind, we focus on the dispute before us which raises the issue of whether the opinion in *Litman v. Massachusetts Mutual Life Insurance Co.*, 739 F.2d 1549 (11th Cir. 1984) ("*Litman I*"), when viewed in its totality, allows for the district court's order on remand.

A. *Procedural History*[6]

This was an action for breach of general agency contract and two counts of slander brought by Bernard Litman ("Litman") against Massachusetts Mutual Life Insurance Company ("Mass

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that would justify dismissal of the indictments. *See* Transcript of June 23, 1981 at 19. With respect to those concerns—namely, the need for integrity of the trial process and the sanctioning of prosecutors—this Court in its prior decision carefully weighed those factors . . . and appeared explicitly to have concluded that a new trial was the appropriate means to protect 'the dignity and integrity of the judicial process.' [*United States v. Curtis*] 644 F.2d [263] at 271 [(Third Cir. 1981)] n. 6. To the extent that the district court would bar a retrial on such grounds, and not on Curtis' constitutional right against double jeopardy, the law of the case doctrine dictates that this Court's determination as to the propriety of retrial must be considered binding.

Curtis, 683 F.2d at 772.

5 The Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit prior to October 1, 1981.

6 Since a complete account of the facts and circumstances surrounding the dispute are adequately detailed in *Litman I*, we need not repeat them, except as necessary in connection with the issue now before us.

Mutual"). The trial resulted in a jury verdict for Litman on all three counts and judgment was entered in the amount of $2,500,234. The jury's verdict included separate compensatory damage awards for the breach of contract claim and each of the two claims of slander.[7] The punitive damage award for the slander was undifferentiated. It was assessed in response to a single question on the special verdict form.[8]

Mass Mutual appealed on several grounds and challenged the punitive damage award asserting alternative theories. Mass Mutual argued that it was entitled to judgment on the issue of punitive damages and in the alternative, that the amount of punitive damages awarded was excessive entitling it to a new trial. Our court affirmed the judgment of the district court with one exception. Finding that the statement made by a Mass Mutual spokesman to a prospective employer of Litman, could not be slander as a matter of law, the court reversed the $100,000 slander award which necessarily resulted in a reversal of the entire punitive damage award. The case was remanded to the district court for a new trial solely on the issue of punitive damages. Mass Mutual made no motions to modify the ruling or to withdraw its challenge to the award of punitive damages.

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7 The compensatory damage awards were apportioned as follows:

— breach of Contract	$2,000,234
— Slanderous Statement made by Mass Mutual spokesman to a prospective employer	$ 100,000
— Slanderous Statements made by two Mass Mutual employees to Litman's former insurance salesman	$ 150,000

8 The question on the special verdict form read: "What amount of punitive damages do you assess against the defendant, Massachusetts Mutual Life Insurance Company for *the* slander?" *Litman I*, 739 F.2d at 1562.

On remand, Mass Mutual filed a written "Waiver of Right to New Trial and Consent to Entry of Judgment." Mass Mutual stated that it was now content to accept the original jury verdict on the punitive damage issue in the interest of terminating the suit. The district court accepted Mass Mutual's argument that if a *prima facie* case for the award of punitive damages against Mass Mutual were shown at all, under our opinion[9] a jury would consider only a portion of the original $250,000 award for the remaining claim which was based on the statements made by two Mass Mutual employees to Litman's former salesmen. Memorandum in Support of Mass Mutual's Waiver at 3, *Litman*, (No. 78-3314 Civ-EBD). Accepting this argument the district court concluded that a new trial on punitive damages would be inappropriate, and was not required by the mandate. The district court acknowledged that the *Litman I* opinion did not hold that the punitive damage award was excessive as a matter of law, but interpreted the holding to indicate that the award was improperly inflated. The district court framed the issue presented by Mass Mutual as a new one. Specifically, the issue as stated by the district court was whether "a [d]efendant, whose right to a new trial has been recognized by the Court of Appeals, [can] waive that right by offering to accept the original judgment, in the situation where the infirmity at the first trial necessarily inflated [p]laintiff's recovery [?]." *Litman v. Massachusetts Mutual Life Insurance Co.*, No. 78-3314 Civ-EBD p. 5 (S.D.Fla. August 20, 1985). The district court answered the question in the affirmative. Final judgment was entered in favor of Litman in the amount of $250,000, with interest from the date of entry of the original final judgment, plus taxable costs of the litigation. *Id.*

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9 There is a fundamental flaw in Mass Mutual's argument. It starts with an incorrect premise. In *Litman I*, the court affirmed the jury determination of a *prima facie* case for the award of punitive damages against Mass Mutual for the statements of its two employees. 739 F.2d at 1562. That became the law of the case.

B. Discussion

Five major premises provide the analytical framework for our disposition of this case. First, the finding that the statement made by the Mass Mutual spokesman to Litman's prospective employer was not slander as a matter of law became part of the law of the case. Second, because the special verdict form posed only a single question for punitive damages on the slander, the reversal of the slander award necessitated reversal of the original $250,000 judgment for punitive damages.[10] The effect of the reversal voided the original judgment.[11] Third, the basis for an award of punitive damages on the surviving slanderous statements was affirmed on appeal and became part of the law of the case. Litman was entitled to punitive damages. Fourth, the litigants were sent back to the district court for a new determination of punitive damages as if the first trial never occurred.[12] Fifth, a jury trial on punitive damages is the only proper outcome under Florida law unless a settlement was negotiated between the parties or the mandate modified by the court of appeals.

Given the law of the case established in *Litman I*, the mandate was clear and specific—the district court was to conduct a new trial solely on the issue of punitive damages. Mass Mutual argues that under Florida law and the facts of this case, a right to a new trial on punitive damages belonged to it alone. We disagree. Our opinion in *Litman I* governs the rights and obligations of both parties. Once the appellate

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10 *See Neely v. Bankers Trust Co.*, 757 F.2d 621, 630 (5th Cir. 1985); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1547-48 (5th Cir. 1984); *Barnes Group, Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1034 (4th Cir. 1983).

11 Reversal is defined as the annuling or setting aside by an appellate court of a decision of a lower court. H. Black, *Black's Law Dictionary*, p. 1185 (5th ed. 1979).

12 *See Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985); *Poletti v. Commissioner*, 351 F.2d 345, 347 (8th Cir. 1965); *United States v. Iriarte*, 166 F.2d 800, 803 (1st Cir.), *cert. denied*, 335 U.S. 816, 69 S.Ct. 36, 93 L.Ed. 371 (1948); *Roth v. Hyer*, 142 F.2d 227, 229 (5th Cir.), *cert. denied*, 323 U.S. 712, 65 S.Ct. 38, 89 L.Ed. 573 (1944).

ruling became final, the right to a new trial belonged to neither party individually but rather to both. The law of the case prescribed the outcome and could not be altered. Although Litman had no right under Florida law to seek a new trial on punitive damages, the first appeal left Litman in a position where the original judgment was set aside yet the basis for the punitive damage award was affirmed. The law of the case established that Litman was entitled to punitive damages. Both parties had a right for a jury to set the amount. But the original judgment as to the amount of punitive damages was null and void. It no longer existed.

The Florida Supreme Court defines the respective provinces of the court and jury explicitly when claims for punitive damages are presented. The court decides whether there is a legal basis for recovery of punitive damages, the jury sets the amount, if any. A trial judge may not substitute its judgment for that of the jury. *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 767 F.2d 1498, 1503 (11th Cir. 1985); *St. Regis Paper Co. v. Watson*, 428 So.2d 243, 247 (Fla. 1983); *Arab Termite & Pest Control v. Jenkins*, 409 So.2d 1039, 1041 (Fla. 1982). Once the error was established on the slander claim, the case necessarily went back for a jury determination of the amount of punitive damages on the surviving claim.[13]

The district court erred when it stated that since the first reasonable jury that heard the evidence awarded an amount of $250,000 based on three slanderous statements, it follows, inexorably, that another reasonable jury, when presented with the assessment of the amount of punitive damages for only two slanderous statements, would fix an amount at less or equal to

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13 This analysis forecloses Mass Mutual's argument regarding Litman's attempt to challenge the punitive damage award on grounds of inadequacy which is prohibited by Florida law. *St. Regis Paper*, 428 So.2d at 247. The second appeal was a result of a district court order reinstating a jury verdict that did not exist. After the *Litman I* court affirmed the legal basis of the punitive damage award on the surviving claim, a new trial became necessary so a jury could determine the appropriate assessment of damage for the purpose of punishment and deterence. *Id.*, *Arab Termite*, 409 So.2d at 1041.

the $250,000 award.[14] *Litman v. Massachusetts Mutual Life Insurance Co.*, No. 78-3314 CIV-EBD p. 4 (S.D.Fla. August 20, 1985). There simply is no basis in law to support such a conclusion. Speculating what a reasonable jury would decide is not within the province of the judicial office. The notion undermines the integrity of the jury system. In addition, it improperly imposes on the clear policy underlying Florida law on punitive damages. "Punitive damages 'are peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage *found by the jury* from the evidence.' " (emphasis supplied). *Arab Termite*, 409 So.2d at 1041 (quoting *Wackenhut Corp. v. Canty*, 359 So.2d 430, 436 (Fla. 1978)). Courts are not free to postulate about what a reasonable jury might decide. The mandate ordered a new trial based on certain slanderous statements, the basis for recovery of punitive damages having been affirmed. *Litman I*, 739 F.2d at 1562. The jury, as dictated by the law of Florida must take *that* circumstance and determine the amount of punitive damages that would best serve the public policy of punishment and deterence. *St. Regis Paper*, 428 So.2d at 247; *Arab Termite*, 409 So.2d at 1041. Judges' feelings that other results are more reasonable do not displace the jury function. *Tennant v. Peoria & Pekin Union Ry*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944). A new jury may award more or less. Judicial review encompasses a determination of whether an inference or conclusion drawn by jury is reasonable. Reasonableness by definition encompasses a wide range of possibilities. It is not for any judge to substitute his judgment in making the infer-

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14 Mass Mutual argued and the district court agreed that the quote from *Arab Termite*, 409 So.2d at 1041, in the *Litman I* opinion stating that an order for a trial on punitive damages was justified when the amount assessed was "out of all reasonable proportion to the defendant's malice," implied that the mandate be interpreted so that the punitive damage award be either less than or equal to the original judgment of $250,000. This interpretation is incorrect. The first panel never attempted to assess the amount of punitive damages. It merely cited the Florida law as support for the legal basis for an order for a new trial on punitive damages.

ences or drawing the conclusions. Since the district court did not conduct a new trial on the amount of punitive damages pursuant to Florida law, Litman became an "aggrieved party," *Piambino*, 757 F.2d at 1120, and is entitled to redress.

It is uncontroverted that money is the center of this dispute. This is the reality of many lawsuits. Litman concedes a desire to maximize his recovery by insisting that Mass Mutual submit to a new trial which it obtained at his expense. Mass Mutual, on the other hand, suggests that its sole interest is terminating the litigation. Although understandable such a decision is not possible after one has taken full advantage of its appellate rights and "lost". It is rather the type of decision required prior to an appeal. Perhaps justifiably fearful of the consequences, Mass Mutual "waived" its right to a new trial and consented to reinstate the original verdict and judgment. Mass Mutual has no right to waive the trial ordered by the law of the case nor can the district court reinstate a verdict which has been vacated by this court. *See Slokin v. Citizens Casualty Co.*, 698 F.2d 154, 157 (2d Cir. 1983). District courts lack the authority to resurrect that which the court of appeals has voided.

That the result may be fair is not the issue we address. Mass Mutual's "waiver" effectively modified the mandate by unilateral action. We hold today that a successful appellant cannot change its mind and take unilateral action in a trial court to modify a mandate of this court. Such post-decision maneuvering undermines the process creating confusion, uncertainty and potential abuse.[15] When the district court accepted Mass Mutual's "waiver" of a new trial solely on the issue of punitive damages, it disregarded the instructions of this court. "Even at

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15 Appeals would almost certainly multiply geometrically. Two examples illustrate the point. First, a defendant in a personal injury action may successfully appeal an adverse verdict only to learn that the plaintiff has since died. In an attempt to minimize his exposure he decides to "waive" the order for a retrial on damages. *Litman II*, 791 F.2d 855, 861 (11th Cir. 1986) (Fay, J., dissenting). Second, a plaintiff appeals a damage award and the appellate court decides it is a compromised verdict. The court mandates a new trial on liability and damages. Plaintiff then decides to "waive" the new trial on liability.

the joint request of the litigants, the district court may not deviate from the mandate of an appellate court." *Atsa of California, Inc. v. Continental Insurance Co.*, 754 F.2d 1394, 1396 (9th Cir. 1985). When the district court agreed with Mass Mutual that a reasonable jury would necessarily conclude that the award would be equal to or less than the original judgment it decided contrary to the law of the case established on the prior appeal and exceeded its institutional authority. *See Farr v. H.K. Porter Co.*, 787 F.2d 1014, 1016 (5th Cir. 1986); *Trahan v. First National Bank*, 720 F.2d 832, 833 (5th Cir. 1983). We feel confident the district court thought it was doing jūstice in this case by issuing the order reinstating the jury verdict.

> Trial judges are more directly and immediately confronted by the demands of doing justice, case by case, than are we; indeed, this is their primary office and duty. Yet it is the considered judgment of our policy that in the long run—if not perhaps in the given case—justice is better served by adherence to general rules.

Trahan, 720 F.2d at 834.

The consequences of *ad hoc* examinations of the propriety of unambiguous mandates are too grave to be allowed.

Mass Mutual's failure to seek modification of our decision had the effect of binding the district court to our instructions as set forth in the clear mandate. Mass Mutual couched the "waiver" as a new issue raised for the first time in the district court on remand. We disagree. We consider the "waiver" to be an attempt by Mass Mutual to circumvent the mandate rule in order to minimize the exposure created when its request on appeal was granted. Mass Mutual had an opportunity to bring the matter before this court. A motion to modify our ruling or withdraw the challenge asserted would have received full consideration.

Mass Mutual advocates the position that the mandate rule is not an "inexorable command" to be followed mindlessly by the district courts without regard to consequences. We agree that the mandate rule is not an "inexorable command." The conse-

quences which may materialize due to circumstances arising after remand, however, are governed by the law of the case doctrine. If circumstances after remand fall into one of the three exceptions to the mandate rule, the district court has greater discretion to act. If the circumstances after remand do not fall into one of the exceptions, as conceded in this case, then the district court is constrained to follow the mandate issued by the appellate court. Since our case falls into the latter category, the district court erred by not conducting a trial on punitive damages.

There are downside risks to appeals. Litigants must use their best judgment when mapping out strategy. If a new trial is requested and the mandate instructs the district court to conduct a trial solely on the issue of punitive damages, the potential risk of a larger award is apparent. Mass Mutual should have assessed and evaluated that risk before it challenged that award in this court.

IV. CONCLUSION.

The mandate is a tool used to ensure that institutional values are maintained and that the allocation of authority and responsibility remains consistent with the design established under the law of our form of government. When an appellate court issues a clear and precise mandate, namely an order for a new trial on punitive damages, the district court is obligated to follow the instruction. Neither the district court nor any party is free to ignore the law of the case, including the determination that there was a basis for an award of punitive damages necessitating a jury assessment of the proper amount. It was inappropriate to "interpret" the *Litman I* opinion in a way that effectively circumvented the mandate. Accordingly, we REVERSE and REMAND the case to the district court with instructions to conduct a trial on the issue of punitive damages as originally ordered.

HILL, Circuit Judge, concurring dubitante:

I concur in the judgment. While I take no specific issue with the reasons for the judgment given in the opinion, I fear that we may not yet have addressed, directly, important considerations.

Much of Judge Fay's splendid opinion points out that those who have lost in the court of appeals may not properly seek to reverse that result in the district court when the mandate appears there. It would seem that this goes without saying, but I certainly take no issue with the majority for saying it again. That, however, is not the problem before us in this case. We do not have a loser in this court seeking to have the district court reverse this court's judgment. What we have here is one who has won in this court undertaking to forego the fruits of its victory. The question is whether or not a litigant *who is the beneficiary of this court's judgment* may elect to forego implementation of its victory in the district court and, if so, how and under what circumstances it should be allowed to do so. Of course, not all mandates of the appellate court are required to be carried out by the district court. If we reverse and remand a case to the district court for a new trial, it is no offense to the dignity and authority of this court that the parties settle the case so that the ordered new trial does not take place. *Absoluta sententia expositore non indiget.*

I apprehend that the problem addressed in this case is the result of shortsightedness on the part of parties and their counsel, asking for relief on appeal even though careful analysis would demonstrate that the relief would be more harmful than helpful. Further, I apprehend that this problem can develop when somewhat overenthusiastic appellate judges find in an appeal relief the judge feels appropriate for a party who has not requested it, but orders it granted, anyway.[1] In each of

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1 This is not what happened in this case. The record makes it clear that Massachusetts Mutual argued for and sought the vacation of the punitive damages, the reassessment of which now looms threateningly on the horizon.

these scenarios, the party apparently prevailing usually finds it is more damaged by the relief when relief is granted on less than all of the issues presented in the appeal.

That is obviously the case here. Had Massachusetts Mutual obtained all of the relief it sought in the appeal, it would be quite content that the mandate be strictly enforced. While it sought the elimination of all damages awarded against it, it obtained the elimination of the only award which Mr. Litman may have been disappointed with, and a new trial has been ordered as to only that one. Thus, having received only partial relief, Massachusetts Mutual is potentially in a worse position than it would have been in had it chosen not to appeal at all.

I believe that our procedures ought to afford a litigant with some relief under these circumstances. Our opinion and judgment should tell the successful party that it has been granted the right to the relief, and that party ought to have some procedure available through which it can waive that right. The nearest thing we have seems to be the right to petition this court for rehearing and, as Judge Fay points out, Massachusetts Mutual did not ask us to vacate any of the relief it had apparently won.

There must be a time limit on the period in which a litigant can seek to waive its relief, and the lack of such a limit is my major concern here. Inasmuch as I am convinced that a litigant such as Massachusetts Mutual ought not have an opportunity, unlimited by time and procedure, to avail itself of the benefits of the judgment or to forego them, the judgment in this case must be correct. Massachusetts Mutual may not pursue the litigation as long as it deems it expedient to do so and then forego the benefits of our mandate when its interest seem thereby served. This would allow a litigant such as Massachusetts Mutual to put its adversary and the district court through preparation for and commencement of the retrial we have ordered, only to tell the district court and its opponent to undo all that had been done if the jurors selected did not suit.

In short, litigants ought not seek relief they really do not want and judges ought not grant relief not sought. Should parties prevail in a limited way to their displeasure, they ought to

move promptly for relief. Ultimately, rules should be established for the waiver of benefits obtained by our judgment, requiring that it be done promptly and for good reason. I concur in the judgment.

TJOFLAT, *Circuit Judge*, dissenting in which JOHNSON and CLARK, *Circuit Judges*, and HENDERSON, *Senior Circuit Judge*, join:

I.

In *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549 (11th Cir. 1984) (hereinafter *Litman I*), a panel of this court held that the district court erred in submitting to the jury a claim of slander that the law does not recognize. The panel therefore set aside the jury's award of compensatory damages on that claim. The panel also concluded that the district court's error in submitting this claim to the jury might have influenced the jury's assessment of the punitive damages the plaintiff, Bernard Litman, was entitled to receive on another claim of slander. Because the panel could not say that the error was harmless, it assumed that the error enhanced the punitive damages award and therefore set that award aside as well. The panel provided the only relief that could right the wrong Massachusetts Mutual Life Insurance Company (Mass. Mutual) had suffered; it ordered "the issue [of punitive damages] remanded for a new trial." *Litman I*, 739 F.2d at 1562.

Following the panel's decision in *Litman I*, Mass. Mutual decided to pay the punitive damages award and waive its right to a new trial. Mass. Mutual promptly notified the district court of its decision and requested the entry of a final judgment for Litman in the full amount of the award. Litman opposed Mass. Mutual's request, arguing that the *Litman I* decision *entitled* him to a new trial on the issue of punitive damages.

The district court considered the mandate of the *Litman I* panel and determined that it could, consistent with the mandate, grant Mass. Mutual's request. The court concluded that the *Litman I* panel had not foreclosed the possibility that "a Defendant, whose right to a new trial has been recognized by the Court of Appeals, [could] waive that right by offering to accept the original judgment, in the situation where the infirmity at the first trial necessarily inflated Plaintiff's recovery." Because the district court believed that Mass. Mutual's proposal would do Litman no injustice, indeed that it would give him the benefit of an improperly enhanced verdict, it required Litman to accept the payment.

II.

The majority chooses to present the district court's action as a threat to the institutional power of appellate courts, the stability and predictability of the law, the law of the case doctrine, and the mandate rule. *See ante* at 1508-1512. I submit that the majority has, regrettably, failed to see the forest for the trees.

In *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2889, 90 L.Ed.2d 976 (1986) (citations omitted), we set forth the law of this circuit regarding the mandate rule, stating the following:

> A trial court, upon receiving the mandate of an appellate court, may not alter, amend or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion, and the circumstances it embraces. Although the trial court is free to address, as a matter of first impression, those issues not disposed of on appeal, it is bound to follow the appellate court's holdings, both expressed and implied.

The *Litman I* panel explicitly ordered a new trial on the issue of punitive damages. In granting Mass. Mutual a new trial, however, the panel did not address, and thus its mandate did not answer, the question whether Mass. Mutual could still pay the punitive damages award, notwithstanding its presumptive excessiveness, and end the controversy. Accordingly, under *Piambino*, the district court was "free to address" this issue and to permit Mass. Mutual to pay the award, in lieu of a new trial, if this would not do violence to *Litman I's* rationale. To decide whether *Litman I's* rationale barred the course the district court pursued, we need not, contrary to the majority's suggestion, reinterpret the mandate rule.

We are now in the same position as the *Litman I* panel would have been had Mass. Mutual requested that panel to clarify its mandate to permit Mass. Mutual to pay the punitive damages award in lieu of a new trial.[1] Indeed, the only difference between the present posture of the case and that hypothetical situation is that Mass. Mutual sought the relief from the district court, rather than from the panel. Although this is obviously not a procedure that we should encourage, logic and common sense favor our approval of the district court's decision.

The *Litman I* panel plainly had the power to amend its mandate to offer Mass. Mutual the choice of paying the punitive damages award or availing itself of a retrial. *Cf. Wilson v. Taylor*, 733 F.2d 1539, 1549-50 (11th Cir. 1984) (ordering plaintiff to accept a remittur or granting defendant a new trial on the question of damages). The majority concedes as much. *See ante* at 1516. Furthermore, such an amendment would not have been inconsistent with, or precluded by, the panel's rationale and holding. The question we must decide is whether the district court was somehow precluded from doing what the panel could, and no doubt would, have done. Common sense dictates that the district court was authorized to grant Mass. Mutual the same relief that the panel could have awarded. Fashioning the same relief cannot be considered as

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1 This would be tantamount to a request that the panel vacate its opinion and dismiss the appeal.

an affront to the appellate authority of this court or to the mandate rule. Moreover, Litman cannot complain. The panel did not grant *him* the right to a new trial; the "right" he claims, and the majority accords him, was merely the consequence of the explicit relief the panel gave Mass. Mutual.

Finally, I must respond to the majority's fear that permitting Mass. Mutual to waive its right to a retrial will create a "potential [for] abuse" of the appellate system. *Ante* at 1515. The majority apparently fears that allowing an appellant who has successfully challenged a damages award as excessive[2] to pay the award in lieu of a new trial will produce a flurry of "risk free" and ill-considered appeals. An examination of the three instances in which a party might consider appealing an award of damages as excessive, whether compensatory or punitive, demonstrates that such fear is unwarranted. First, if the damages award is below the reasonable range dictated by the facts of the case, the defendant will have no incentive to appeal because he will most likely lose. His only possible incentive to appeal would be to induce the plaintiff to accept less than full payment of his award to save appellate attorney's fees and costs. On reflection, however, the defendant will realize that this is really no incentive at all because he will incur the same, if not more, fees and costs than the plaintiff, and he will incur them earlier.[3]

Second, if the damages award is within the reasonable range dictated by the facts of the case, the defendant may have a slight incentive to appeal. The measure of the defendant's incentive to appeal will depend on where within the reasonable range the award fell, i.e., the higher the award is within the range, the greater the incentive to appeal. Again, in deciding whether to appeal, the defendant will realize that saving attorney's fees and costs will probably not induce the plaintiff

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2 The ground that the award is excessive would include claims that the evidence did not support damages in the amount awarded and claims that the damages were improperly enhanced because of trial court error, the type of claim Mass. Mutual prevailed on in *Litman I*.

3 The defendant would have to pay the filing fee and pay for the preparation of the trial transcript, expenses not borne by the plaintiff, and would incur his attorney's fees first, his brief being due first.

to settle for less because the plaintiff will know that the defendant's fees and costs will be greater, and he will call the defendant's bluff. In other words, the plaintiff will refuse a post-verdict compromise settlement because he will know that the defendant will have to pay practically dollar for dollar for any discount of the award he might obtain, i.e., the defendant will incur fees and costs in *X* amount to get the plaintiff to accept *X* amount (the sum of the plaintiff's fees and costs) less. It is only in the case where the damages award is very close to the top of the reasonable range that the plaintiff may be willing to accept something less than full satisfaction of his judgment. Finally, if the damages award is higher than the reasonable range dictated by the facts of the case, the defendant will have an incentive to appeal; few defendants readily acquiesce in an exaggerated verdict.

I fail to see how granting a victorious appellant—who has persuaded the appellate court that his adversary's damages award is excessive and has been accorded a new trial—the option of paying the excessive award and terminating the case will encourage even one more appeal. The granting of such an option could not possibly damage the federal judicial system or impair the orderly administration of justice. On the contrary, by ridding the courts of the burden of retrials that successful appellants wish to avoid, the option will benefit the system.[4]

I respectfully dissent.

EDMONDSON, *Circuit Judge*, concurs in the judgment.

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4 The majority also argues that "[e]ven at the joint request of the litigants, the district court may not deviate from the mandate of an appellate court." *Ante* at 1516 (quoting *Atsa of Calif., Inc. v. Continental Ins. Co.*, 754 F.2d 1394, 1396 (9th Cir. 1985) (citation omitted)). Surely the majority cannot mean that a district court must always hold a new trial merely because the appellate court ordered one to cure the error suffered by the appellant. If, after the issuance of a new trial mandate, all parties agree to settle the case, I cannot conceive of any logic or rule of law that would forbid the district court from closing the case.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5025

D.C. Docket No. 78-03314-CIV-EBD

BERNARD LITMAN,

Plaintiff-Appellee,

—v.—

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Before

FAY and ANDERSON, *Circuit Judges*,
and MARKEY*, *Chief Judge* of the Federal Circuit.

* Honorable Howard T. Markey, Chief Judge, U. S. Court of Appeals for the Federal Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED in part and REVERSED in part; and that this cause be, and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal.

Entered: August 27, 1984
For the Court: Spencer D. Mercer, Clerk

By: *(illegible)*
Deputy Clerk

ISSUED AS MANDATE: OCTOBER 23, 1984

CERTIFICATE OF SERVICE

I, JOSEPH P. KLOCK, JR., a member of the Bar of this Court, HEREBY CERTIFY that on this 30th day of October, 1987, three (3) copies of this Petition for Writ of Certiorari were mailed, first class postage prepaid, to:

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I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
NOV 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-704

In the Supreme Court of the United States

OCTOBER TERM, 1987

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

BERNARD LITMAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

As we shall explain in the argument which follows, the petitioner's primary contention—that the "*Erie* doctrine" was violated by the court of appeals—has no colorable basis in the record. This case therefore presents neither of the two questions presented for review by the petitioner. The only legitimate question which could have been presented for review here is the question which was presented to and decided by the *en banc* court below, which we state as follows:

Whether a district court must obey an unambiguous mandate of a court of appeals where an appellant, in order to escape an adverse consequence of only partial success on appeal, has unilaterally stipulated after remand to a result contrary to the mandate.

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
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vs.

BERNARD LITMAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Bernard Litman, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's *en banc* decision in this case.

STATEMENT OF THE CASE

The petitioner's statement of the case contains only a handful of minor inaccuracies. Under ordinary circumstances, we would simply correct those inaccuracies and

turn directly to the reasons why certiorari should be denied. We are unable to do that, however, for several reasons. First, the minor inaccuracies have been coupled with selective omission to present a subtly distorted picture of our position below, as well as the court of appeals' ultimate endorsement of it. Second, the petitioner has purposefully blurred the quite separate issues presented in the two different appeals below, in order to manufacture a foundation for one of the questions presented for review—a foundation which, in our judgment, does not exist. And finally, the argument constructed upon the statement of the case contains some additional inaccuracies which need to be corrected before we can properly respond to the petitioner's petition. We therefore deem it prudent to restate the case here briefly for the general reorientation of the Court.[1]

The respondent, Bernard Litman, was the plaintiff below in a three-count action against the petitioner, defendant below, Massachusetts Mutual Life Insurance Company. The three counts involved a single claim for breach of contract, and two claims for separate defamatory statements made by agents of the defendant. The action was tried to a jury, which returned a verdict for Mr. Litman on all three counts. The verdict included an undifferentiated punitive damage award of $250,000.00 for the two slanders. After judgment was entered on the verdict, the defendant declined to pay any portion of it—and the judgment was appealed to the court of appeals. Among other things, the defendant contended there that

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1. Like the petitioner's statement of the case, our brief restatement of the case will be bottomed upon the face of the decisions contained in the petitioner's appendix, so we will not trouble the Court with unnecessary references to the underlying record.

the punitive damage award was excessive, and it requested a new trial on the issue of punitive damages. It also challenged the legal propriety of both of the slander awards.

The plaintiff did *not* contend on appeal that the punitive damage award was inadequate, and he did not ask for a new trial on the issue of punitive damages. Neither did the defendant contend that Florida law prohibited the court of appeals from ordering the new trial on punitive damages which it had affirmatively requested, nor was the "*Erie* doctrine" (upon which the defendant now predicates its request for further review) ever mentioned in the court of appeals. The court ultimately held, *inter alia*, that the punitive damage award was not excessive, and that no new trial was required for that reason, but that one of the slander awards was legally improper —and it reversed the plaintiff's judgment for compensatory damages on that claim. As a *consequence* of that reversal (because the punitive damage award was undifferentiated), a new trial was ordered on the issue of the amount of punitive damages owing to the plaintiff for the other slander claim upheld by the court.[2]

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2. In an effort to shade its position somewhat here, the defendant has characterized the relief ordered as a "right" which belonged to it, and not to the plaintiff. We prefer to characterize the relief as an "adverse consequence" of the defendant's only partial success on appeal. In the final analysis, of course, these labels are merely semantic devices, and neither of them can change the fact that the new trial was ordered as a consequence of the failure of the verdict form to differentiate between the punitive damage awards for the separate slanders. The court of appeals also made it clear in the second appeal that the result it reached was bottomed upon the substance of what occurred, rather than upon any distinction between "right" and "consequence", so the court need not attach any significance to the different labels which the parties have selected to characterize the relief ordered in the first appeal.

The court of appeals' opinion (and therefore the mandate accompanying it) plainly and unambiguously stated three times that the district court was to conduct a *new trial* on the issue of punitive damages on remand:

> . . . Accordingly, we hold that the issue of punitive damages, damages which were in part based upon such slander, must be returned to the district court for a new trial. . . .
>
> . . . However, in view of our reversal of the slander award based upon the statements of James Martin, we must remand the punitive damage issue to the district court for a new trial. This result is inavoidable [sic]. . . .
>
> . . . We likewise hold that the award of punitive damages must be reversed and the issue remanded for a new trial. . . .

Litman v. Massachusetts Mutual Life Insurance Co., 739 F.2d 1549, 1552, 1562 (11th Cir. 1984).

Upon remand, however, the district court did not conduct a new trial on the issue of punitive damages. In fact, it flatly refused to conduct a new trial on the issue—and reentered that portion of the final judgment which had previously been reversed by the court of appeals. The impetus for this ruling was the defendant's post-appeal recognition that the adverse consequence of its only partial success on appeal—the retrial of the punitive damage issue (which it had affirmatively requested from the court in connection with another issue on appeal)—was exceptionally risky. To avoid this belatedly-recognized risk, it stipulated in the district court that it would pay the punitive damage award reversed by

the court of appeals, rather than face the new trial ordered by that court. Over the plaintiff's objection that the district court had no authority to violate the court of appeals' mandate in that fashion, the district court complied with the defendant's request. Convinced that the district court's order improperly allowed the defendant to manipulate the final result in the case by "accepting" the benefit of its appeal and "waiving" its adverse consequence, in a manner directly contrary to the court of appeals' mandate, the plaintiff appealed and sought enforcement of the mandate.

It was not until this second appeal that the defendant asserted that Florida law prohibited a plaintiff from obtaining a new trial for an inadequate punitive damage award. (Although this may have been an indirect assertion of the "*Erie* doctrine", *Erie* itself was never cited in the defendant's briefs.)[3] This position was not asserted for the proposition that the court of appeals had committed error in its disposition of the first appeal, however, nor could it have been properly asserted for that proposition,

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3. *Erie* was mentioned only once, and then only in passing in the defendant's supplemental brief on rehearing, where it was offered as justification for the initial panel's majority opinion: "The panel majority simply concluded, as they were *Erie*-bound to do [etc.]" (supp. brief, p. 19).

The failure of the defendant to argue *Erie* in either appeal is an obvious answer to the feigned puzzlement expressed in footnote 8 of the defendant's petition: "Interestingly, despite the clear variance from controlling state law, the court of appeals makes no reference to the obvious *Erie* implications of its result." There is a better answer to this rhetorical footnote, however. As we shall demonstrate in the argument which follows, there was simply no "variance from controlling state law" which would have justified discussion of any "*Erie* implications". Moreover, even a cursory reading of the court of appeals' decision will reveal that the majority was careful to follow and apply Florida law on every substantive issue discussed.

since it had never been asserted in the first appeal. (That, however, is essentially what the defendant has argued here under the first question presented for review.) Instead, this position was asserted in support of the defendant's argument that the district court could legitimately disregard the express command of the court of appeals' mandate by "interpreting" it to conform to the requirements of Florida law. (That is essentially what the defendant has argued here under the second question presented for review—and we take it to be self-evident that that question is considerably different than the first.)[4]

The panel which initially heard the appeal affirmed the district court's order (with one judge dissenting). *Litman v. Massachusetts Mutual Life Insurance Co.*, 791 F.2d 855 (11th Cir.), *vacated*, 798 F.2d 1355 (11th Cir. 1986), *overruled on rehearing*, 825 F.2d 1506 (11th Cir. 1987) (*en banc*). This decision can be disregarded here, however, because it was subsequently vacated when the court of appeals granted the plaintiff's suggestion for *en banc* rehearing. *Litman v. Massachusetts Mutual Life Insurance Co.*, 798 F.2d 1355 (11th Cir. 1986), *on rehearing*, 825 F.2d 1506 (11th Cir. 1987) (*en banc*).

The majority's opinion on rehearing speaks well enough for itself, of course, but it is worth noting that the defendant's primary contention here—that the "*Erie* doc-

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4. The defendant also argued that the district court's ruling was permissible because it resolved a "new issue" not embraced by the mandate, and that contention has been resurrected here as if it were fact. The majority expressly rejected this contention, however, and not even the dissenters endorsed it (since even they acknowledged that the district court's ruling was inconsistent with the mandate). Like *all* of the judges below, we think it is simply indisputable that the defendant's post-appeal maneuver did not present a "new issue" not embraced by the mandate.

trine" was violated by the court of appeals' disposition of the first appeal, and by its refusal to allow the district court to change that disposition thereafter—was dispatched essentially as follows: the new trial on punitive damages ordered by the court in the first appeal was not ordered at the request of the plaintiff, nor was it ordered to correct an inadequate punitive damage award, so it did not violate Florida law; the new trial was an unavoidable adverse consequence of the defendant's only partially successful appeal; and, once the initial punitive damage award had to be reversed, the only proper outcome under Florida law was a new trial on punitive damages. The court also held, of course, that the district court had violated its mandate by refusing to conduct the new trial which it had initially ordered. *See Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F.2d 1506 (11th Cir. 1987) (*en banc*). We will explain the propriety of both of these rulings in the argument which follows.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The first question presented for review was not preserved for review.

We intend to demonstrate in the next subsection that the court of appeals did even arguably violate the "*Erie* doctrine" in either of the two decisions which form the backdrop for the defendant's complaints here. Initially, however, we think it important that the Court understand that the first question which the defendant has presented for review is simply unreviewable here. According to the defendant's first argument, the court of appeals vio-

lated the "*Erie* doctrine", not in the decision which it seeks to have reviewed, but in its first decision, when it initially mandated a new trial on the issue of punitive damages. We do not doubt the Court's ability to reach back at this juncture, examine the issues presented in the first appeal, and correct any errors committed there. *See, e. g., Mercer v. Theriot,* 377 U.S. 152 (1964). Before the Court can do that, however, the issue which the defendant seeks to have resolved here must have been presented to the court of appeals in the first appeal. *See, e. g., Delta Air Lines, Inc. v. August,* 450 U.S. 346 (1981); *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970).

Clearly, the first question presented for review here was not presented to the court of appeals in the first appeal. The defendant never argued in the first appeal that Florida law prohibited the court from ordering a new trial on the issue of punitive damages. In fact, it argued exactly the opposite—that Florida law required a new trial on the issue because the punitive damage award was "excessive". The court of appeals rejected that contention, but found it necessary to order a new trial on the issue nevertheless, for a different reason. The defendant neither complained of this disposition in its motion for rehearing, nor otherwise sought any relief from it in the court of appeals. In short, not a word was ever expended in the first appeal on the "*Erie* doctrine", or anything like it.

It was not until after remand that the defendant decided to raise the issue by attempting to "waive" the adverse consequence of its only partially successful appeal—asking the district court, in effect, to square the final result in the case with the defendant's reading of Florida law by refusing to conduct the new trial ordered by the court of appeals. The propriety of the district court's ruling on

that quite different issue, as well as the court of appeals' reversal of it in the second appeal, may well be reviewable here under some modified form of the second question presented for review (or the alternative question stated at the outset of this brief). However, the first question presented for review was never presented below in any manner, shape, or form—and it is therefore simply unreviewable here.

2. Neither of the two questions presented for review has any colorable basis in the record.

In any event, both of the questions presented for review here are bottomed upon a single broad assertion (repeated over and over again in numerous variations)—that the new trial on punitive damages to which the defendant must now submit is prohibited by Florida law, and that the bottom line of the decision below therefore violates the "*Erie* doctrine". We disagree. Of course, we concede the cornerstone of that argument—that Florida law prohibits a plaintiff from challenging a punitive damage award as "inadequate" and obtaining a new trial on that ground. *St. Regis Paper Co. v. Watson,* 428 So.2d 243 (Fla. 1983). But to concede the cornerstone is not to concede the remainder of the edifice constructed upon it. In this case, the plaintiff did not challenge the initial punitive damage award as "inadequate", and the new trial was not ordered on that ground—so the principle of *St. Regis Paper Co.* was not even arguably violated by the court of appeals' initial mandate.

While that is the short and simple answer to the defendant's essential contention, the contention can be answered in a slightly more elaborate but equally dis-

positive way, by demonstrating the converse—that the court of appeals' initial mandate was also perfectly consistent with (indeed, that it was required by) Florida law. Although *St. Regis Paper Co.* prevents a plaintiff from challenging a punitive damage award as "inadequate", Florida law clearly does not prevent a *defendant* (or a plaintiff, for that matter) from challenging any error which may have impermissibly affected a punitive damage award, and new trials limited to the issue of punitive damages are clearly authorized. *See, e. g., Bankers Multiple Line Insurance Co. v. Farish,* 464 So.2d 530 (Fla. 1985); *Arab Termite & Pest Control, Inc. v. Jenkins,* 409 So.2d 1039 (Fla. 1982); *Wackenhut Corp. v. Canty,* 359 So.2d 430 (Fla. 1978); *Hartford Accident & Indemnity Co. v. Ocha,* 472 So.2d 1338 (Fla. 4th DCA 1985); *Rabren v. Straigis,* 498 So.2d 1362 (Fla. 2nd DCA 1986); *Stephens v. Rohde,* 478 So.2d 862 (Fla. 1st DCA 1985), *review denied,* 488 So.2d 832 (Fla. 1986).

That, of course, is what happened in the instant case. The *defendant* appealed, and it challenged, among other things, the legality of the plaintiff's recovery of damages for the two slanderous statements proven to the jury's satisfaction. The court of appeals upheld that challenge in part, concluding that one of the slanderous statements was privileged as a matter of law, and that the plaintiff could therefore recover no damages for it. It was simple enough at that point to set aside the jury's separate award of compensatory damages for the privileged statement, but the undifferentiated punitive damage award for both slanderous statements presented a more difficult problem. Following settled federal law governing this oft-recurring procedural problem (*see* the decisions cited in footnote 10 of the majority's opinion below), the court

reversed the now only partially-supported punitive damage award and remanded for a new trial on the issue.[5]

As we have previously noted, the defendant did not challenge this disposition as contrary to Florida law in the court of appeals. If it had, however, it would have been wrong—because Florida procedural law required precisely the same result. A good example can be found in *Flagship National Bank v. Gray Distribution Systems, Inc.*, 485 So.2d 1336 (Fla. 3rd DCA), *review denied*, 497 So.2d 1217 (Fla. 1986). In that case, as in this case, the plaintiff recovered compensatory and punitive damages on multiple counts, but the punitive damage award was not apportioned between the two causes of action for which punitive damages had been assessed. In that case, as in this case, the defendant appealed, and successfully asserted its entitlement to judgment on one of the causes of action for which punitive damages had been awarded.

Faced with the identical dilemma faced by the court of appeals in this case, the Florida court resolved it in precisely the same way:

> Addressing the trial court's award of damages, we find that the trial court awarded damages on three counts without specifying the amounts attributed to breach of contract, to Flagship's failure to dispose of collateral in a commercially reasonable manner, and to Flagship's improper conduct in obtaining the

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5. Since this was a procedural ruling, rather than a ruling upon an issue of substantive law, we doubt that it even implicates the "*Erie* doctrine". There is no need for us to debate that point, however, since the ruling (however it is characterized) was clearly consistent with Florida law, as we shall demonstrate momentarily.

> settlement agreement. The trial court also failed to apportion the punitive damages between the counts addressing the breach of contract and the settlement agreement. Our holding that Flagship did not breach its contract vitiates any award of either compensatory or punitive damages on that ground. Under the trial court's prior judgment, however, Flagship remains liable on the settlement agreement count for compensatory and punitive damages. . . . Because we are unable to determine what portion of the damage awards is attributable to the count pertaining to the settlement agreement, we remand for a new trial on this issue. . . .
>
> . . .
>
> For these reasons, we hold as a matter of law that no breach of contract occurred, and that accordingly, Gray is not entitled to recover either compensatory or punitive damages predicated on that ground. We remand for a new trial to enable the court: . . . to determine the amount of compensatory and punitive damages to which Gray is entitled for Flagship's improper procurement of the settlement agreement . . . .

485 So.2d at 1341, 1342.

This decision is only representative. There are others, which need not be belabored. *See, e. g., Montgomery Ward & Co., Inc. v. Hoey,* 486 So.2d 1368 (Fla. 5th DCA), *review denied,* 494 So.2d 1151, 1152 (Fla. 1986); *Uvanile v. Denoff,* 495 So.2d 1177 (Fla. 4th DCA 1986), *review dismissed,* 504 So.2d 766 (Fla. 1987). The point is simply that the court of appeals' disposition of the first appeal was perfectly consistent with Florida law, and not even arguably in violation of it. As a result, the defendant's

contention that the "*Erie* doctrine" was violated by the court of appeals does not raise even a colorable issue in this case. The questions presented for review are therefore so clearly without merit that certiorari should be denied as to both.

3. The court of appeals' decision is correct.

Once the questions presented for review are stripped of their clearly erroneous assertions that the court of appeals violated the "*Erie* doctrine", none of the reasons set forth in Rule 17 as touchstones for review by certiorari is even arguably implicated by the court of appeals' decision. The defendant does not even bother to assert conflict with any decisions of this Court or other courts of appeal, nor does it assert that the decision presents an important question of federal law which has not been, but should be, settled by this Court. The reasons for the absence of these assertions should be obvious from the face of the majority's opinion. The defendant *does* assert that the court of appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." However, this assertion is half-hearted (and, in large part, merely a variation upon its "*Erie* doctrine" theme), and it amounts to little more than an assertion that the court of appeals made a mistake in applying settled principles of law to the unique facts in this case. And, to the extent that *that* contention is lurking between the lines of the defendant's extended argument upon the "*Erie* doctrine", we think it is clearly wrong.

In the final analysis, the decision of the court of appeals announces nothing which has not already been

thoroughly settled by this Court. This Court long ago emphasized that an appellate court's mandate is sacrosanct, and that an inferior court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided upon appeal; or intermeddle with it, further than to settle so much as has been remanded." *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). *See Ex parte Sibbald v. United States*, 37 U.S. 488 (1838); *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948); *United States v. Haley*, 371 U.S. 18 (1962); *Stanton v. Stanton*, 429 U.S. 501 (1977); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424 (1978).

It would also appear to be settled that a mandate is a mandate is a mandate—and when an inferior court has been directed by a superior court to proceed upon remand in a specific manner, the specific requirements of the mandate cannot be avoided by any unilateral act of a party following remand, like the unilateral stipulation by which the defendant sought to avoid the court of appeals' mandate in the instant case. *See, e. g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967) ("The Department of Justice, however, by stipulation or otherwise, has no authority to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate."); *Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (same); *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 n. 6 (1961) ("But plainly . . . no stipulation by the Government could circumscribe

this Court's power to see that its mandate is carried out.").

Finally, it would also appear to be settled that, once a jury verdict which is tainted on an issue must be entirely set aside in favor of a new trial, it cannot remain in the wings subject to unilateral reinstatement by a party, or as a contingent limitation upon (or to be satisfied as an alternative to) the second jury's *de novo* review of the facts: when a new trial is ordered, the case "goes back to the trial court and there stands on the issues as if the former trial had not taken place." *Roth v. Hyer*, 142 F.2d 227, 229 (5th Cir.), *cert. denied*, 323 U.S. 712 (1944). *See Gospel Army v. City of Los Angeles*, 331 U.S. 543, 547 (1947) (reversal for a new trial "places the parties in the same position as if the case had never been tried").[6]

The court of appeals' decision is perfectly consistent with all of these settled general principles governing the particular issue presented here, and it is therefore facially correct. At the very least, the settled existence of these consistent general principles of law precludes a conclusion here that the court of appeals "so far departed from the accepted and usual course of judicial proceedings" as to require the exercise of this Court's general power of supervision. Since none of the remaining "Considerations Governing Review on Certiorari" set forth in Rule 17 is even arguably implicated by this case, we respectfully submit that it is not a proper case for the extraordinary intervention of this Court.

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6. Additional decisions on this point are collected in footnote 12 of the majority's opinion below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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EDITOR'S NOTE

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FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

—v.—

BERNARD LITMAN,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Massachusetts Mutual Life Insurance Company, files this reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.[1]

REPLY TO THE RESPONDENT'S ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT

Petitioner, Massachusetts Mutual Life Insurance Company ("Mass. Mutual"), has demonstrated that the court below seriously departed from *Erie* principles by mandating that Mass. Mutual must undergo a second trial on punitive damages. Respondent, Bernard Litman ("Litman"), raises three arguments in response: (1) he suggests that the issue of the *en banc* court's violation of *Erie* is not properly before this Court, because the issue was not raised by Mass. Mutual in the first appeal; (2) the action of the *en banc* court is consistent with

1 In compliance with Rule 28.1 of the Supreme Court Rules, Petitioner, Massachusetts Mutual Life Insurance Company, incorporates by reference the list of subsidiaries contained in the Petition for Writ of Certiorari.

Florida law; and (3) that Mass. Mutual has stated no basis for certiorari review. Litman's arguments are without foundation in either fact or law and to the extent that he relies on Florida law at all, he relies on a Florida case that does not reach the issues upon which this petition is predicated.

1. The *Erie* Violation is Properly Before this Court

The failure to adhere to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and to apply settled state law occurred with the *en banc* court of appeals and did not, as Litman maintains, arise in the first appeal. Litman has recharacterized both Mass. Mutual's position and the record below in an attempt to manufacture an argument more to his liking. The fact remains, however, that it was not the panel in the first appeal nor the panel in the second appeal, but the *en banc* court that failed to consider or apply settled Florida law.

Furthermore, it is absurd to suggest that a party must anticipate that a court will fail to follow *Erie* and thus extensively brief the point. The *Erie* doctrine has been the law for nearly half a century. *See Erie*, 304 U.S. at 64.

Litman's claim of waiver is invalid for the additional reason that Mass. Mutual did, in fact, raise the *Erie* claim before the *en banc* Eleventh Circuit. The issue was raised by Mass. Mutual in its *en banc* brief, not in a "supplemental" brief as characterized by Litman.[2]

That the *Erie* issue did not arise until the *en banc* court ruled necessarily distinguishes the *en banc* decision from the cases upon which Litman relies.

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2 Mass. Mutual raised *Erie* by stating: "The panel majority simply concluded as they were *Erie* bound to do . . . ." (pg. 19 *en banc* brief of Mass. Mutual). Litman, therefore, misstates the record when he says at page 5 of his Response to the Petition for Certiorari that "*Erie* itself was never cited in the defendant's briefs." Waiver, even if relevant, does not turn on the number of lines in a brief which are devoted to a point of law.

In both *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Delta Airlines, Inc. v. August*, 450 U.S. 345 (1981), the alleged error occurred in the district court, was never raised before the court of appeals and was raised for the first time before the Supreme Court. *See Adickes*, 398 U.S. at 148 n.2 ("The District Court denied petitioner's request to amend her complaint to include a third count. . . . Although in her certiorari petition, petitioner challenged this ruling, . . . the record shows that petitioner never raised any issue concerning [this] before the Court of Appeals."); *Delta Airlines*, 450 U.S. at 362 ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion . . . that question was not raised in the Court of Appeals and is not properly before us.").

There is no higher intermediate court of appeals before whom Mass. Mutual may seek review. The failure of the *en banc* court of appeals to apply binding substantive state law in a diversity case first arose in the *en banc* opinion below and is properly before this Court now for review.

2. Under a Correct *Erie* Analysis, State Law Controls the Availability of a Right to Retrial on the Issue of Punitive Damages

The right in question here is the right to a new trial on the issue of punitive damages. In Florida, the plaintiff has no right to punitive damages. In consequence, the Florida courts quite logically have found that the plaintiff also has no right to a new trial based on claimed insufficiency of an award alone. *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 247 (Fla. 1983).

Proper *Erie* analysis requires more than the superficial statement that because a rule of appellate "procedure" is implicated, state law becomes moot and is not binding on a federal diversity court. What Litman prefers to characterize as "procedure" is viewed by the Florida Supreme Court as a substantive right. *St. Regis*, 428 So. 2d at 247; *See also Adler*

v. Seligman of Florida, 438 So. 2d 1063, 1068 (Fla. 4th DCA 1983).

Florida's policy decision regarding punitive damages is clearly an issue which "affects those primary decisions respecting human conduct which our constitutional system leaves to *state* regulation." *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (emphasis added). On the issue of punitive damages, state law, therefore, is binding on a federal appellate court sitting in diversity. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958); *Hanna*, 380 U.S. at 460.

3. Under Florida Law Litman May Not Force Mass. Mutual to Endure a Retrial on Punitive Damages

The Florida Supreme Court has determined that absent a fraud on the judicial system only the defendant is entitled to a new trial on the amount of punitive damages to be awarded. *St. Regis*, 428 So. 2d at 247; *Adler*, 438 So. 2d at 1064. Under Florida law the plaintiff simply "has *no* right to punitive damages." *St. Regis*, 428 So. 2d at 247 (emphasis in original). Since that right belongs only to the defendant,[3] a plaintiff cannot force a defendant to endure a retrial on punitive damages solely to gain a shot at enlarging the punitive damages award the second time around. The result of the *en banc* court's decision is to allow Litman to do exactly what he may not under Florida substantive law based upon an untenable "mandate rule" justification.[4]

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3 In Florida, a defendant has "a *right* to be free from unreasonable punishment inflicted by an excessive punitive damages award." *St. Regis*, 428 So. 2d at 247 (emphasis added).

4 In Florida, a new trial on punitive damages can only be ordered under certain limited circumstances. Under Florida law a new trial on punitive damages is permitted only "when the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage or wantonness of tortious conduct." *Arab Termite and Pest Control of Florida, Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982).

To mask the *en banc* court's error, Litman relies principally on an intermediate Florida appellate court opinion which Litman suggests supports the *en banc* court's decision. The case, *Flagship National Bank v. Gray Distribution Systems, Inc.*, 485 So. 2d 1336 (Fla. 3d DCA), *review denied*, 497 So. 2d 1217 (Fla. 1986), does not decide or even discuss the issue presented in the instant litigation.

Flagship does stand for the proposition that a *defendant*—as opposed to a plaintiff—who prevails on appeal may be *entitled* to a retrial on the issue of compensatory and punitive damages. Nowhere, though, does the court in that case treat the question whether a defendant on remand may choose to forego *his* right to a retrial on punitive damages and accept the jury award from the first trial. *Id.* at 1341. Consequently, in citing *Flagship*, Litman relies on a case which was in exactly the same posture as was the instant case up through the first panel appeal. Unlike the instant case, however, *Flagship* has no subsequent reported history. In an obvious effort to evade the real issue with which Litman apparently does not wish to deal, he cites a case where the issue of disposition on remand was never addressed.

In his discussion of *Flagship*, Litman fails to disclose that the *Flagship* court cited with approval another Florida case, *Adler v. Seligman of Florida, Inc.*, 438 So. 2d at 1063. In *Adler*, the court relied on *St. Regis* and repeated that in Florida a plaintiff does not have a "right to a punitive award even if the evidence would support such an award." *Id.* at 1068 (emphasis added in part). On the basis of *St. Regis*, the *Adler* court refused to remand with instructions that would require the fact finder to assess punitive damages against the defendant. *Id.*

The point is, thus, settled and unambiguous in Florida. The plaintiff has no right to appeal on the issue of the sufficiency of a punitive damage award. Therefore, the defendant may not be forced on remand to suffer a second trial on this issue. *St. Regis*, 438 So. 2d at 247; *Adler*, 438 So. 2d at 1068. The

Florida Supreme Court's opinion in *St. Regis* remains as the clear and binding statement of Florida law.[5]

4. The Failure of the *en banc* Court of Appeals to Adhere to *Erie* Principles is Not an Error Which is Unique to this Case

Litman's attempt to alter the facts in this case is apparent as he strives to recast the case as one involving a peculiar fact situation coupled with a misapplication of Florida law. That is not the issue presented in this case, and despite Litman's efforts to have this Court believe otherwise, the facts—as opposed to Litman's argument—support Mass. Mutual's position. The record below clearly reveals that the error the *en banc* court committed was not a misapplication of Florida law, but rather where *Erie* is concerned, a more significant error, a failure to consider state substantive law.

This Court has previously found the *Erie* doctrine to be sufficiently important to warrant the exercise of the Court's discretionary jurisdiction. *See, e.g., Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir.) (per curiam) (*en banc*), *cert. granted*, ____ U.S. ____, 108 S. Ct. 225 (1987); *Burlington Northern R. Company v. Woods*, ____ U.S. ____, 107 S. Ct. 967 (1987); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam); *Hanna v. Plumer*, 380 U.S. at 460. Moreover, *Ricoh*, *Burlington Northern R. Co.*, and *Challoner*, are all recent *Erie* cases arising out of either the Eleventh Circuit or its predecessor, the old Fifth Circuit, thus suggesting that recognition and application of *Erie* is far from "settled"

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5 If the Eleventh Circuit had any doubt as to the Florida law with respect to punitive damages, it should have utilized the certification procedure available in Florida and certified the question to the Florida Supreme Court. *See* Fla. R. App. P. 9.150; *See also Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974) (In *Schein*, this Court endorsed the certification procedure available in Florida when there is any doubt regarding a controlling issue of Florida law.).

and continues, at least in the Eleventh Circuit, to be problematic.

In particular, the Eleventh Circuit case, *Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d at 1066, which this Court will shortly consider,[6] underscores the continuing difficulty the Eleventh Circuit has with *Erie* questions. In *Ricoh*, the *en banc* Eleventh Circuit, after performing its *Erie* analysis, concluded that federal rather than state law governs the enforceability of a forum-selection clause in a contract between private parties even though if the case had been brought in the courts of the forum state the contract would *not* have been enforced. *Id.*

In *Ricoh*, the dissent charges that the *en banc* court's *Erie* analysis is flawed because of a confusion about the real issue in the case. *Id.* at 1077 (Godbold, J., dissenting) ("*This case is not about what court is suitable. It is about an agreement to choose between suitable courts.*") (emphasis in original).

The Eleventh Circuit's confusion over *Erie* has continued unabated and with the instant case has turned down a more troubling path. By failing to even consider *Erie* (as opposed to misapplying *Erie*), the Eleventh Circuit threatens a return to the time, preceding *Erie R. Co. v. Tompkins*, when the federal courts refused to acknowledge state decisions by favoring a uniformity of federal general common law, and when the outcome in a case was determined by the fortuitous selection of which courthouse one chose within the same state. *See, e.g., Swift v. Tyson*, 10 U.S. (16 Pet.) 1 (1842); *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

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6 The court also currently has before it *Bankers Life and Casualty Company v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), *prob. juris. noted*, _____ U.S. _____, 107 S. Ct. 1367 (1987), a case which raises the issue of the unconstitutionality of unfettered jury discretion in punitive damages cases. That issue is highlighted here by the fact that Mass. Mutual already having run the gauntlet once, now faces a forced retrial on the issue of punitive damages.

The only justification offered by the Eleventh Circuit for its intrusion into a matter rightly left to state determination is the need to preserve the sanctity of the mandate rule.[7] When measured against the conscious policy choice of a state in an area solely of state concern the comparative federal interest, to the extent that it even exists, is simply too weak a ground upon which to allow the decision to stand. *See* C. Wright, The Law of Federal Courts 386 (4th ed. 1983); *See also* Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356 (1977).

Litman, therefore, is wrong when he states that the *Erie* doctrine in general and the *Erie* question presented in this case are unworthy of this Court's consideration. The *Erie* doctrine expresses the cardinal principles of comity and federalism. *See Hanna*, 380 U.S. at 474 (Harlan, J., concurring). As in *Ricoh*, the writ should issue in this case to resolve whether state law should have been applied.

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7 There is serious question about this point as well. Curiously, the Eleventh Circuit chose to construe the lower court's ruling as high offense, when the trial judge, the first panel, and four judges of the Eleventh Circuit saw a clear way of interpreting the action below in a consistent fashion with the mandate.

Conclusion

Petitioner, Massachusetts Mutual Life Insurance Company, respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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